FEDERAL UNION
IN
PRACTICE

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THE BRITISH CONSTITUTION

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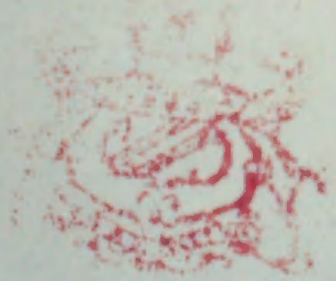

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CONTENTS

"Man owes what he is to the association of man with man." There is a truth in this claim of the great German jurist, Gierke. The state is merely one association for the service of man among many. State, church, party, trade union, county, confederation of states, international cartel,—these are each an "association of man with man." It is that fact which gives them a significance or a personality. They may differ in purpose and power; loyalty to one or the other may be stronger at any given moment; the purpose expressed in one may seem more important than the purpose expressed in another; one may be harder to leave than another; but all derive their authority from the same origin: they are associations of man with man.

The state does not differ in the source of its power. It is an association connected with a particular territory. Since one of its functions is to maintain order, and since order requires some single institution as the ultimate interpreter of law, it must contain such an institution. But, like other associations, it is limited by the purposes for which it exists and for which men accept its existence.

Federation and all its problems can only be understood when these simple facts have been appreciated. No thinker of the Middle Ages would have had the least difficulty in accepting them. But unfortunately the whole subject has been dominated since then by the development in power of the unitary nation-state, which has even sometimes been claimed to sum up all the interests, aims, and loyalties of man in one god-like leviathan, on whose altar it is his highest achievement to make a sacrifice of himself, and all

that he believes and loves and lives for. This unitary nation-state, however, is only a relatively short-lived phenomenon. At most it can only claim a life of some three or four hundred years. But its coming has coincided with the most active period of political speculation since the ancient Greeks. And because men are always apt to attribute to the particular, and possibly fleeting, conditions in which they live qualities of permanence, to regard what actually is as the only natural condition, they have elevated a short-lived development into an ultimate category. Because the nation-state exists today and has power, they assume that it is ordained by providence for all time.

From this unhistorical approach we arrive at an unreal contrast. The unitary state is treated as an ultimate form. The federal state, it is true, may sometimes seem to be a mere stage in the growth of a unitary state. Even so, a stage which in America has lasted a century and a half can hardly be without importance. But it might also, on the same reckoning, be true that a unitary state is a stage in the evolution of a federal state, since in fact the latter has generally been created out of the former. Finally, if a confederation sometimes disintegrates into several independent states, it is not unknown for the unitary state to do the same, Scandinavia, the British Empire, and South America providing examples.

For political systems are no static expression of an unchanging world. This is no less true in the international than in the internal sphere. Between associations of states, or which go beyond the limits of the state, it is not always possible to draw clear and incontestable distinctions; but they do show a dynamic relation between at least some of them. Alliance shades into league, league into confederation, confederation into federal state, federal state into unitary state. Either of the last two can again form alliances with political systems beyond its borders; and so the circle is

completed. Movement from one to the other occurs from time to time, according as men's loyalties are more actively engaged by the bigger or the more limited purpose. For men may be members of several at the same time. Thus a Canadian, for example, may be at one and the same moment a member of his province or state, of the federal union of Canada, the British Commonwealth, the League of Nations, and of an alliance with France for the conduct of war. And just as he decided eighty years ago to create a federation, in 1919 to accept the League Covenant, recently to claim final independence of Westminster, so might he determine tomorrow to end federation by dividing it, or to limit it by merging it in a bigger union.

But most of these associations of states have characteristics by which, despite these provisos, they can be conveniently marked off from the rest. An alliance is for restricted and temporary ends and does not have common instruments of administration; it can be easily broken for it creates no barriers, except perhaps the lapse of time, to its own termination. A league may partake more of the qualities of a confederation or of an alliance. On the other hand, a confederation is permanent in intention; it differs from an alliance in that it has permanent common organs with some functions of government, however rudimentary. It is distinct from a federal state because the latter establishes direct relations between its general government and its citizens, who not only share in the task of constituting it but also submit to its rule without the interposition of the state governments as intermediaries. A unitary state is generally marked by the fact that its institutions are not of co-ordinate authority, but that there are none whose competence cannot be determined without restriction by the supreme legislature. These distinctions, however, are matters of convenience, and many political forms merge the characteristics of one with those of another. The alliance between England and

France during war, for instance, has some aspects which belong to confederation rather than alliance, for it has created several organs of joint administration and has a single commander-in-chief.

In this study we are concerned with the more complete, far-reaching, and permanent applications of a principle common to all the above categories. That principle is combination for particular purposes of government, while there is retention of independence for other purposes. Its application is examined region by region.

I

The Growth of Federations

I. FEDERALISM IN THE ANCIENT WORLD

We know too little about the exact nature of government institutions in the ancient world to be able to draw any useful conclusions from them. Much has been written about the many applications of federal ideas in Greece. There can be no doubt of the existence of several federations among the city-states. Indeed, without some form of union, several of them could hardly have survived as long as they did. But we do not know enough of the conditions which brought about their creation, or the methods by which they operated, to be able to draw any useful conclusions. It is not without importance, however, that they did exist; and that is so mainly for two reasons.

In the first place, the idea of federal union is thus shown to be old, and men are apt to be influenced by the claims of an idea to a respectable antiquity. Secondly, it has meant that political thinkers have been led to speculate upon the nature and value of confederation. This is particularly true of the political thinkers of eighteenth-century France. Montesquieu, who was in so many ways the chief guide of the Americans when they formed their constitution in 1787, said much in praise of federation. He took as an example of federalism at its best the Lykian League. "If it were necessary to provide a model for a good federal republic," he wrote, "I should take the republic of Lykia."

From his examination of Greece in particular he made many claims for the advantages of federalism that undoubtedly influenced the Americans, and through them the creators of other federal constitutions. A confederation, he argued, "has all the internal advantages of republican govern-

ment, combined with the external power of a monarchy." He claimed that federalism was the cause of the long flourishing of ancient Greece. The contemporary confederations of Holland and Switzerland, he asserted, were universally regarded as "eternal republics." He pointed out that federalism provides a defence against the internal growth of despotism because a would-be dictator can only obtain power in one small area at a time, and so can be readily suppressed by the healthier partners to the union. For the same reason it provides a safeguard against sedition and corruption.

On every count Montesquieu draws a comparison between the United Provinces of Holland and the confederation of Lykia which is favourable to the latter. The lessons of ancient Greece can best be shown by repeating his brief account. "The republic of Lykia," he wrote, "was an association of twenty-three cities; the large ones had three votes in the common council; the middle ones had two; and the smallest, one. . . . The cities of Lykia paid contributions according to the proportion of their suffrages. . . . In Lykia the judges and magistrates of the cities were elected by the common council and according to the proportion we have mentioned." Holland differed on each point to its own detriment, although it had the useful provision that no province could form an alliance with another state.

2. THE UNITED STATES OF AMERICA

The United States is the outstanding example of a federal union for several reasons. The vastness of its present area and population is the most obvious, but not the most important, of these. Union grew spontaneously without being previously imposed by a foreign power. This especially distinguishes it. So also does the fact that federalism has endured in it for a century and a half. In many of its aspects,

which have since remained unchanged, the American constitution was entirely original, and as Bentham said of it at the time it denied the adage "nothing new under the sun." Several of its characteristics have been imitated elsewhere, and thus have become familiar methods of federalism in practice. The most interesting invention is the Federal Supreme Court, about which I shall have more to say later.

American federal union is, in fact, noteworthy above all for two things. It has shown a real capacity to adapt itself to conditions that could not have been foreseen when it was created. The functions undertaken by the modern state of controlling and improving social conditions and initiating or co-ordinating economic enterprise were not thought of in the eighteenth century. Nevertheless, great strides forward along these lines have been taken in America in recent years despite the obstacles set by a federal structure built by men who had not these possibilities in mind. That these developments have required a strengthening of the authority of the central government at the expense of the powers of the state governments, and that this means a definite movement towards the form of a unitary state, does not diminish the significance of the adaptability shown. Nor would anyone assert that this movement had yet gone as far as it must. But that it is even possible to compare federal America with unitary states, whose success in this field is by no means complete, is proof of the dynamic nature of American federalism. For a fair comparison would lie not between the American federal system and a unitary system, but between the actual development there and the alternative of what would have happened had the thirteen independent states of 1777 survived as conflicting sovereignties.

Secondly, the American experiment has given rise to valuable political thought as to the nature, the difficulties, and the advantages of federalism, and so has provided the modern world with a wealth of facts and ideas which was

not available to the American fathers. In the history of this political thought, directly stimulated by American federalism, the Frenchman Tocqueville and the Englishman Bryce have played an honourable part.

Apart from Montesquieu's remarks on the confederations of Ancient Greece, the American colonists who declared their independence in 1776 could look for guidance to little else than their own past experience. This was not very promising, for they might well have been excused for regarding their own New England Confederation of 1643 as but another example of the failure of such systems to add to the story of its failure in the ancient world. They did not take that defeatist attitude, however, and therefore 1643 marks a stage in the evolution of federal America.

It is instructive to notice the causes which brought about the union of the New England colonies in 1643. To begin with, the colonists make it clear that they regard the fact of their separation as accidental. They have a common origin, similar reasons for their emigration from the home country, and above all, the same religious creed. But, as they say in the opening words of their *Articles of Confederation*, "we are further dispersed upon the sea-coasts and rivers than was at first intended, so that we cannot (according to our desire) with convenience communicate in one government and jurisdiction." When thus forming a union it was, of course, natural that they should emphasize the accidental nature of their separation; but that they could and did do so is nevertheless significant. In this way confederation could be put forward as a conservative policy suggested both by reference to the past and by mere practical convenience in the present.

Moreover, the strongest and most usual reason for confederation was very definitely present. The colonists were afraid of their neighbours, the French and Dutch, and they had recently had trouble with the Pequot Indians. "We live incompassed," they said, "with people of severall nations

and strange languages which hereafter may prove injurious to us and our posterity and . . . the natives have formerly committed sundry insolencies and outrages upon severall plantations of the English and have of late combined against us."

The final reason is equally revealing. England is just entering upon a period of civil war. Although the colonists have not hitherto shown any disposition to welcome interference from home, they are careful to point out that conditions there now preclude them from receiving advice or protection, "which at other times we might well expect." In fact they imply that the sovereign power being inoperative it is expedient they should institute a new co-ordinating authority.

This loose confederation, though accepted, was never welcomed by the home government; and after the revocation of the Massachusetts charter in 1684 it disappeared. But meanwhile its form and purposes are worth notice.

It was described by the colonists themselves as "a firm and perpetual league of friendship and amity, for offence and defence, mutual advice and succour, upon all just occasions, both for preserving and propagating the truth and liberties of the Gospel, and for their own mutual safety and welfare." Their intentions were thus made clear. But their method of carrying them out showed how strong was their spirit of mutual independence and how small their knowledge as yet of the essentials of effective federal union.

Although it had two-thirds of the total population of the four coalescing colonies, Massachusetts received only equal representation on the central body of eight commissioners. Nevertheless, contributions were to be made according to population. Each colony retained complete independence within its own jurisdiction. Six out of the eight commissioners, however, could decide in matters concerning the union where unanimity was not possible. Thus it was

possible for one colony to be overruled by the rest. But no provision was made for enforcing the decisions of the commissioners upon a colony they overruled. These were often successfully defied.

One serious blow was the steady refusal of Massachusetts in 1652 to obey the six commissioners and go to war with the Dutch. Another blow, which also showed how little the federal notion was understood in London, was struck by the success of one colony, Connecticut, in swallowing up another colony, New Haven, in its charter of 1662, despite the violent protests of the latter and the feeble protests of the commissioners. The third colony, of New Plymouth, proposed in 1665 that the confederation be dissolved; thereafter the annual meetings ceased, being reduced to one every three years; and, with the brief exception of the war-period beginning in 1675 when the commissioners raised troops and defeated the Indians, the spirit of the union died, while the particularist tendencies of its parts became stronger. When the Massachusetts charter was revoked in 1684 the Confederation finally disappeared.

That the idea of union for common purposes, while maintaining self-government, was still present in men's minds throughout the next century is shown by the variety of proposals made along these lines. The two best known, but by no means the only, examples of these were put forward by two of the leading citizens of the colonies, by William Penn in 1696, and by Benjamin Franklin in 1754. They carry us forward from the first confederation of 1643 to that of the revolted colonies in 1777, and thus to the present American constitution of a decade later.

William Penn's "brief and plain scheme" is indeed too brief and plain to indicate any originality. Exactly the same method of representation is proposed as that of 1643, namely, two for each of the now more numerous colonies regardless of their relative importance. Nor is any means

suggested for securing obedience to the federal authority. It is significant, however, that the proposal was made, it would seem, to arrest the growth of particularism and conflict, and to provide a means of assessing fair quotas of contribution. In the proposed Congress, he argued, "the quotas of men and charges will be much easier and more easily set than it is possible for any establishment made here to do; for the Provinces knowing their own condition and one another's can debate that matter with more freedom and satisfaction and better adjust and balance their affairs in all respects for their common safety." It was, of course, this very problem of the assessment of charges that was to become a source of quarrel between England and America. Possibly the application of Penn's plan might have avoided this conflict by building a centre of common responsibility.

But ideas had developed in the next sixty years. The great work of Montesquieu had pointed to the advantages of a federal republic. He had even compared certain methods of federating, suggesting the practical advantages of adopting one rather than another.

When the Board of Trade summoned a meeting of representatives of the various colonies in 1754 to consider matters of common concern to them all, Benjamin Franklin put forward a far more advanced and a far better worked out scheme for uniting them than had ever yet been thought of. It shows the influence of Montesquieu. Opinion was not yet ready for it, however; and there was no sense of urgent need, no special and immediate fear, to cement the bonds of union. Each colony was intent on its own independence, and treated this proposal for union with scorn. Nevertheless, Franklin's scheme carried the idea of federation an important stage further. It put forward a practical policy of an advanced character. By its influence on opinion it prepared the way for later schemes which were to come to fruition.

Franklin's proposal had certain important original features.

Its general council was to be a really effective body with power to tax and to raise an army and navy, provided that it did not force men into its service against the will of the colony from which they came. Its laws could only be overruled by disallowance on the part of the King in Council. But the most interesting feature of Franklin's scheme was his provision for constituting the general council. This was not to be based on the principle of equality between colonies of different wealth and man-power, although some recognition of that principle was accorded by providing for a minimum of two and a maximum of seven representatives. Within those limits the number of representatives was to be proportional to the tax paid. He thus attempted to solve the problem of equality along the lines recommended by Montesquieu in his account of confederation in Greece. The first American union was soon to adopt the same principle. The chief executive officer of Franklin's proposed union was to be a President, appointed and supported by the Crown, who was to play the same part in America as that played in England by the King.

Members of the grand council were not to be elected directly, it is true, but by the House of Representatives in each colony. But the federal government was to have direct relations with its citizens, and to have the power necessary to enforce its decisions. If the colonies were to remain the administrative areas of the union, and to retain their own governments, they were nevertheless subjected to the federal treasury and federal defence, as well as to the general legislative authority of President and Council.

When conflict broke out with England the only hope for the small and scattered colonies was to combine. The Congress of United Colonies met in September 1774. Each of the twelve colonies represented had one vote. They agreed to support Massachusetts in resisting the British troops by force. A president and secretary of Congress were appointed,

and in 1775 George Washington was elected commander-in-chief of the colonists' army.

It is highly significant that even before the issue of the Declaration of Independence the Congress was asserting that "as to the people or Parliament of England, we had always been independent of them, their restraints on our trade deriving efficacy from our acquiescence only, and not from any rights they possessed of imposing them; and that, so far, our connection had been federal only, and was now dissolved by the commencement of hostilities." For it is clear from this use of the term "federal" to describe their relations with the home government that their next step, the setting up of a committee "to prepare a plan of confederation for the colonies," could be claimed to imply no revolutionary change in their mutual relationship. On the basis of this assertion they were merely substituting one common authority for another. It was naturally easier to agree rapidly upon the form of a confederation if this were so, and as in fact they did. The articles of confederation were passed by Congress on November 15th, 1777; and they were directed to be submitted to the legislatures of the colonies for ratification, and to be reported to Canada, after being translated into French.

The urgent reasons for speedy ratification were pointed out to the colonies in an accompanying letter sent to them by Congress. It spoke of "the absolute necessity of uniting all our councils, and all our strength, to maintain and defend our common liberties . . . surrounded by the same imminent dangers." Thus again, as in 1643, the chief argument for union is fear of invasion and the need for common defence.

But if there was much in the past to suggest the practicability of federal union, there was no doubt of the sovereignty of each colony or of the difficulty of combining. Perhaps Thomas Paine had overstressed these difficulties

when he wrote in his *Commonsense* in 1776: "If there is a country in the world where concord . . . would be least expected it is America. Made up as it is of people from different nations, accustomed to different forms and habits of government, speaking different languages, and more different in their modes of worship, it would appear that the union of such a people was impracticable." But Congress itself, which was nothing more than the representatives of these very colonies, recognized as it wrote in this same accompanying letter, "the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities." After all, there were no less than thirteen colonies, each with its own history, and each independent of the rest for the last century.

It is essential to understand how different in fact were the states which adopted the principle of federalism in 1777, and carried it forward into an effective federal state ten years later. For, although it is true that they had previously had a common superior, and thus been linked together in some measure, and although their common safety called for combination, the depth of that difference alone explains the outcome. A federal form of union was the only conceivable solution because it was the only way in which their fundamental separateness could be recognized as the reality it was. The extent to which they were willing to pool their sovereignty in 1787 is a remarkable tribute to their leadership and to their political ability. No better explanation has been given of the depth of their separateness than by Woodrow Wilson. "That the states survived the union," he wrote, "was no political accident. Their separateness did not consist in the mere casual circumstance that they had been settled at different times, and their governments as colonies separately chartered by the English kings. Vital social and economic differences existed between them. They could not

have been made a real political community by any single constitution, however broadly and wisely conceived, because they were not a community in fact. They were in many respects sharply contrasted in life and interest. Virginia was much more unlike Massachusetts than Massachusetts was unlike England. The Carolinas, with their lumber forests and their rice fields, felt themselves utterly unlike Virginia; and the Middle states, with their mixture of population out of many lands, were unlike both New England and the South. The Middle states, New York, New Jersey, and Pennsylvania were, indeed, not mere transplantations out of the mother country; they had the mixture of peoples in them which was in the years to come to be characteristic of America."

What was this confederation of 1777 which was so soon to prove inadequate, but which, nevertheless, was the parent of a federal constitution that has lasted for more than 150 years?

It was "a firm league" and "perpetual union" between the thirteen colonies for "common defence, the security of their liberties, and their mutual and general welfare." When Congress drew up the articles of confederation, it is worth remarking that it acted by majority vote, rejecting sometimes by quite a small vote amendments proposed by the colonial legislatures.

The colonies bound themselves to assist each other against all force. A common citizenship and equal commercial privileges were declared. There were to be no separate alliances with foreign states or among themselves, no army or navy or declaration of war, without the consent of Congress. Congress was to consist of delegates appointed annually by the state legislatures, numbering not less than two or more than seven, but exercising a single collective vote. "Charges for common defence or general welfare" were to be "defrayed out of a common treasury, which shall

be supplied by the several states, in proportion to the value of all land within each state . . . as the United States in Congress assembled shall direct. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states." Congress was to be the court of appeal for disputes as well as being the postal and coinage authority. It was to make rules governing the land and naval forces, but each state was to maintain its own militia.

A two-thirds majority, that is to say a vote by nine states, was required before Congress could engage in war, appoint a commander-in-chief, form an alliance, coin or borrow money, or appropriate moneys for defence or welfare. That the agreement was regarded as in the nature of an international treaty was shown by the provision that it could not be amended without the approval of the legislatures of all thirteen states. It was ratified between 1777 and 1781.

Congress, the only common authority, was thus extremely weak. It had no direct claim on the loyalty of citizens, nor any direct contact with them. Its finances were dependent on the willingness of the states to collect and hand them over. It had no troops with which to enforce its decisions unless these were raised and supplied to it by the state legislatures with the knowledge that they might be used against themselves. As Robert Morris, the superintendent of finance for the thirteen colonies, truly described it, it was "a government whose sole authority consists in the power of framing recommendations." Indeed its power was much the same as that of the Assembly of the League of Nations.

One of the major difficulties, to remedy which amendment was being proposed as early as 1785, was the lack of authority in Congress to make commercial treaties, regulating trade and imposing duties to implement them. Yet it is significant of the high claims of the states that even here it was only argued that amendment was necessary in order to apply

arrangements which might be come to with Holland, Sweden, and France to levy duties, the product of such duties to accrue to the treasuries of the states collecting them.

But there were many other and at least equally urgent difficulties. Congress could not coerce its members, even when, as often happened, they were unwilling to hand over the moneys which were legally due. Trade and boundary disputes threatened war and led to bloodshed; and Congress was powerless to prevent them. The states issued worthless currency. Often Congress had no quorum, and even the particularly important meeting of the convention summoned to reform the articles of confederation had to wait three weeks for enough delegates to appear. The difficulties culminated with the attempt of Shay's rebels to capture the League arsenal in Massachusetts, when—so strong was state sovereignty and so feeble the Confederate authority—Massachusetts refused to allow Confederate troops to enter its territory even to guard the common arsenal.

In view of all this, it was hardly surprising that the need was felt and expressed for a constitutional reform. To meet this need a convention was summoned and met in Philadelphia in May 1787.

It required no brilliant insight to see that the real source of the inadequacy of the central authority lay in the principle so strongly stressed in 1777 that each state retained "its sovereignty, freedom, and independence, and every power, jurisdiction, and right."

A solution of the problem was sought in the creation of a written constitution based on the principle of balancing one power against another. The object was to set up an equilibrium of opposing forces, a division of authority, in which none should be strong enough to interfere with the rights, whether of individual citizens or of the states, established by the constitution itself. For, if federation was induced primarily by foreign danger, and the fear of divisions at

home leading to intervention from abroad, there was another reason for it that at least rivalled this in urgency. It was the fear of lawlessness. The revolutionary tide must be stemmed. Even a democratic majority at home might turn into a new tyranny, infringing the sacred rights of life, liberty, and property, and the creation of such new tyrants must be avoided. This meant the need for an effective central authority; but, since the abuse of power is natural to man, this central government must be composed of separate and counteracting forces, each able to check unlawful action by the others.

This notion of checks and balances, eloquently put forward by Montesquieu, lent itself naturally to the construction of a federal state. The existence of state governments distinct from the central authority established both an additional check upon arbitrary rule and a further reason for avoiding the concentration of power. The idea of checks and balances, to preserve the compact to which they were asked to agree, provided a further argument for that agreement, since, as a means of preventing change, it would also be a means of maintaining their rights and stabilizing their position. Thus, what might have been regarded as a complexity—the need for establishing a separately constituted and separately empowered executive, legislature, and judiciary—in fact proved a simplification. The legislature itself could be divided into two mutually checking and balancing chambers, a house of representatives expressing the unitary, and a senate expressing the federal or state-rights, principle. Here, especially, the idea of checks and balances was the begetter of a compromise solution which greatly eased the path of federal union.

Federation was founded on a further factor, the simple plea of usefulness. Experience, it was argued, showed the practical advantage and expediency of an effective central government. And nothing could be more in keeping with

Anglo-Saxon political ideas, whether expressed by Hobbes, Locke, or Burke, than this argument. Adopting this attitude, Hamilton argued that a powerful federal government would mean efficient administration. It would attract the best men into it. Preventing jealousy and division, it would secure defence. Important causes of disagreement existed between the states, and among these Hamilton particularly instanced the unexploited lands in the west, commercial disagreement, foreign action on the principle "divide and rule," and the way in which the public debts of the union should be paid. Because of the greater tendency to anarchy in confederate states owing to man's natural loyalty to the group nearest to himself, the central executive must be strong, and the army must be a federal concern.

These considerations, coupled with the experience of the preceding decade of a confederacy ineffective because it lacked a central government, go far to explain the federal structure of 1787. What had been most clearly shown by the Confederation was that the central legislative must be strengthened by the creation of a central executive and judiciary. The enforcement of decisions must be carried out by direct control on the part of the central government over citizens. It was an acknowledgment of the vital distinction between the Confederation and the federal state. Action by a group of governments, or even by a central authority representing them, against another government must be replaced by the action of federal officials against persons. "Federal union meant," as Mr. K. Smellie has pointed out in his study, *The American Federal System*, "that each citizen was to be directly subject to two authorities: his state for some purposes; the national or federal authority for others." For social purposes the former, for economic and political purposes the latter, was to be the authority. What was wanted was "not so much the addition of new powers to those of the old Confederation as an invigoration of its original

powers. In particular, the new national legislature must be supported by a national executive and judiciary. As they themselves were compelled to carry out a virtual *coup d'état* because it was impossible legally to amend the old Confederation, they were agreed that in the new constitution amendments must not be dependent upon the consent of all the states."

But many compromises were necessary before federation could be achieved. The recognition of the equality of state rights in the Senate, and of common and equal citizenship in the House of Representatives, has already been mentioned. Opposition between the industrial north which wanted protective tariffs and the southern states which wished for free trade had to be resolved. The difficulty was met by providing that inter-state commerce should be under federal control, treaties should require ratification by two-thirds majority in the Senate. It would thus be possible for the South to prevent commercial treaties from coming into force if it acted in unity. Another difficulty was the desire of the South to count their slaves for voting purposes but not for the purpose of reckoning federal taxation. Compromise here was reached by the decision to reckon three-fifths of the slaves for both voting and taxing purposes.

The method of electing a president raised several difficulties. He could not be selected by Congress because the principle of the separation of powers required that he should not be subordinate to Congress. The people could not be trusted to elect him directly for they had not, it was argued, the political ability. It was feared that if the choice was left to the states simply, each would always prefer one of its own citizens. Therefore it was provided that an electoral college should be elected in each state, that this should then choose two candidates, one of whom must not be one of ts own citizens, and then if none secured a clear majority, one of the five at the head of the pool should be chosen by the House of Representatives.

The division of powers between the federal and state governments did not differ greatly from that which had prevailed in the Confederation. All which were not expressly conferred upon the former were to continue to belong to the latter. Trade, foreign relations, control of army and navy, the laying and collecting of taxes, coinage, the post office, the declaration of war—these were the concern of the federal government. On the other hand, the republican form of government was to be maintained in the states. The constitution was declared fundamental law, the federal judiciary having the function of interpreting it and declaring any state or federal act which contravened it illegal. The difference between 1777 and 1787 lay less in the making of a new division of jurisdictions than in the creation of institutions with the means of enforcing the law, institutions that were based on the conception of a common citizenship and not of an alliance between states.

Despite the keen fear of radical change, some attempt was made to provide for adaptation. Congress was empowered to admit new states. Amendment was to occur if agreed by two-thirds of both Houses of Congress, when it had been ratified by the legislatures of three-quarters of the states. The difficulty of obtaining such a huge majority can be seen from the fact that after the early formative years no amendment occurred between 1804 and 1865; and after the second formative period that followed the civil war there was no amendment for forty years.

The constitution was accepted because it seemed likely to provide defence against radicalism at home, and because it created a common authority which it was hoped would be strong enough to secure the opportunity, uninterrupted by interference on the part of the Canadians and British to the north or the Spaniards to the south, of exploiting the western territories. Ratification was made to depend on the immediate passing of amendments aimed at defending property

and religion and freedom of expression from encroachments by the federal authority. Even so, it was the work of a small minority, the outcome of bitter contests. Of the sixty-five delegates, mostly governors and ex-congressmen, who were appointed to the Philadelphia Convention of 1787, ten did not attend, and only thirty-nine of the remainder signed the constitution.

A federal system demands special foresight in its creators. Being in the nature of a compact between already existing powers, it must be written, and it is improbable that the contracting parties will submit to too facile a procedure for change or adaptation. Moreover, it enshrines two conflicting tendencies; it gives sanctity to the state governments which look back to a period of independence and to a central authority which looks forward to a time of complete unitary sovereignty. This conflict was immediately apparent in the development of American federalism. On the one side were the agrarian interests, whose point of view was expressed in the democratic philosophy of Jefferson. This asserted that the excellence of self-government was best found in the smallest units, and attempted to minimize the importance of the central government. The federal structure appears as a pyramid, which can be sound only if it is broadly based upon strong units. On the whole, Jefferson's is the philosophy of the union for the first half of its existence. But Hamilton's much stronger emphasis on the importance of the central government had secured sufficient recognition in the constitution for it to maintain and increase its strength. The tariff controversy, for instance, resulted in the successful federal assertion of the right to erect tariffs which, though of equal application, benefited one type of production and so could favour one state at the expense of another, and was, in fact, to the advantage of the North.

The federal state, being a relatively new experiment, was surrounded by doubts as to its exact nature. Different interpretations, no doubt quite honestly made, could be and were used to support opposing interests. These opposing interests lay deep in the economic structure of the country. The agrarian and slave-owning states of the South feared the growing preponderance of the northern states, due to industrialism, and welcomed political theories that stressed state autonomy. There were two main subjects of contention. Who has the ultimate right to interpret the constitution? Is a state entitled to secede at will?

The problem of constitutional interpretation itself had two aspects. In the first place it involved a conflict between the federal supreme court and the state legislatures. There was developed by the South the "doctrine of nullification." This was best expressed in a report adopted by the House of Representatives of Southern Carolina in 1828. "A single state," it was here asserted, "has the right to arrest the execution of a law of the United States within its limits . . . the arrest is to be assumed right and valid, and is to remain in force till three-quarters of the states shall otherwise decide." This anarchistic doctrine was clearly incompatible with a continuance of the union, for it would have meant the application of different interpretations of the constitution in different parts of the country. Secondly, there was rivalry between Congress and the Supreme Court. Madison had argued that "an exposition of the Constitution may come with as much propriety from the legislature as from any department of government." This view, although later adopted in other federal systems, was defeated in the United States, and the federal government correspondingly weakened. As Chief Justice Marshall pointed out, it would mean that constitutional limitations were quite unreal. An act of Congress would enjoy equal validity with the constitution, and there would no longer be a fundamental law. In fact, Marshall's view has triumphed. The various Judiciary Acts all clearly impose the constitution as interpreted

by the Supreme Court. Although constitutional adaptation has often had to come by means of new interpretations by judges, and this method as opposed to the cumbersome process of amendment has been favoured widely, this judicial supremacy has often slowed down reform, and has sometimes strained the constitution to breaking-point. About this more will be said later; but the first aspect of the conflict, the struggle between the states and the federal authority, with the Supreme Court sometimes—as in the Dred-Scott case where its interpretation would have prevented Congress from abolishing slavery in the territories—favouring the states at the expense of the central government, was only resolved by the Civil War.

Similarly, the Civil War alone settled the question of the right to secede. The contention of the secessionists was best expressed by Calhoun in his *Discourse on the Constitution and Government*, published in 1854. According to this theory the changes of 1787 were merely in the political superstructure, not in the foundation. The United States was still a confederation. The constitution was a compact between the states, not a law set over them. Powers granted were on trust, and by implication could be withdrawn. The United States is "a community composed of states united by a political compact, and not a nation composed of individuals united by a social compact." On the other hand, it was claimed by the federalists that the existence of an American nation was not a myth, but that the constitution proceeded from the conscience of its individual members. Sovereignty, they agreed, rests with the people, but the people was the American people as a whole; it was they who ordained the Constitution. Thus it was argued, for instance, by Senator Webster. The Constitution created a common government; although arrived at by agreement, the result is not a compact but a law. The terms "accession" and "secession" are meaningless; nullification is the same as destruction, and

destruction is revolution. Similarly, Francis Lieber regards nationalism as the foundation of American political institutions, and traces the historical development of an American nation from the United Colonies of New England, through the Penn and Franklin plans of union, to the Declaration of Rights by Congress in 1765, the Declaration of Independence, and the Confederate and Federal constitutions. The United States form a single state not only because of the evolution of nationalism, but because it is necessary to the development of the citizen. Secession, he claimed, is an idea not thought of in any confederacy, an extravagance.

But the Civil War which broke out in 1861 proved that secession was in fact more than an idea; it was a right claimed with the backing of force.

The Civil War has a peculiar interest for the student of federal union because in many ways it was a conflict between two rival methods of federalism—between confederacy and the federal state. And it is true to say that "the principle on which the South based its actions before 1861, and on which it hoped to base its future government was its chief weakness." As Professor F. L. Owsley suggests, in *State Rights in the Confederacy*, "it died of state rights." The lack of cohesion of the South was indeed typical of the earlier stages of federalism. Each state maintained its own troops for its own defence. Governor Brown of Georgia, for instance, resolutely refused to come to the assistance of other states, and was extremely jealous of the authority of the President of the Confederacy; but as soon as Georgia was threatened he urgently demanded Confederate aid. The states individually refused men and arms to the Confederacy, prevented the execution of the common conscription laws, and insisted on their rights of appointment, control, and equipping of the common force. Lack of arms at the outset, and lack of men later, hampered the building of the Confederate army. It is highly significant that while 350,000 volunteers had to be

refused by the Confederate government during the first twelve months for lack of arms, the arsenals of some of the states were overflowing, for it suggests that the individual citizen was more ready than the vested interests of the state governments to further the common cause. The extent to which it proved impossible for these reasons to co-ordinate supplies is shown by Governor Vance's boast that at the end of the war he had every soldier of Northern Carolina well clad, 92,000 uniforms, and thousands of blankets, shoes, and tents in store, when at the same time in Virginia Lee's men were barefooted and almost without blankets. The South was undoubtedly weakened by this selfish insistence on state rights, but it must not be forgotten that they had a smaller population and therefore less prospect of ultimate success than the North from the outbreak of hostilities.

Nor must it be forgotten that the cause for which the South was fighting, the right to secede and form a more limited confederation, was not foreign to early interpretations of American federalism. There had been a real prospect of the New England states of the north applying the same claim at the beginning of the century, when they feared the dominance of the South; and a New England confederation had actually been mooted. Economic difference was the real explanation of the outbreak of war. It was only later extended by the North to the moral issue of slavery.

In the same way, it was growing economic unification after the war that made of federal union a settled reality and welded separate interests into a single nation. The development of trans-continental telegraphs, roads, canals, and railways, the increasing interdependence of north and south and west, of industry and agriculture, the preoccupation with exploitation of the west, and with an imperialism that required a strong and united federal backing—all together provided the convincing argument of economic advantage for maintaining and strengthening federal union.

As Bryce pointed out in 1888, the Civil War had decided that the states had renounced sovereignty on entering the union, that the states should, nevertheless, remain as a part of the governmental machinery, and that the demarcation of powers under the Constitution was satisfactory. But it also gave to the central government the function of defending person and property. In the judicial interpretation of such constitutional safeguards was to be found one of the main obstacles to the smooth evolution of a modern state, which more and more takes upon itself the task of organizing social services, and the utilization of national resources, and so must be able to regulate the property claims of the few in the interests of the community. It hindered for a long time the imposition of an income tax and placed obstacles in the way of regulation of labour conditions. That the problem is not yet solved is shown by the constitutional difficulties which have restricted President Roosevelt's "new deal" policy, despite his strong electoral majority.

3. SWITZERLAND

The origin of the Swiss Confederation belongs to the Middle Ages, but it is only in 1848 that a truly federal state was formed. While it has six and a half centuries of continuing and growing union behind it, Switzerland as an effective political entity is sixty years younger than the United States.

At first sight it would seem that nothing could be more suggestive of the difficulty of federation than the story of its development in Switzerland. It took five centuries of experience of a loose combination, followed by the forcible imposition of unity by foreign powers, culminating in a civil war, to persuade the cantons to create a federal authority. On the other hand, it is striking that a com-

munity of interest and views survived these difficulties. And it must be remembered that the principles of federalism were not understood until the latest stage in this protracted evolution, and that when they were at last applied the earlier disunion and ineffectiveness rapidly disappeared.

The Helvetian League was born in 1291. It was an agreement for mutual defence, and for the settlement of disputes between themselves by arbitration, which was made by the small democratic cantons of Schwyz, Uri, and Unterwalden.

Gradually the League grew. It was joined by cities like Lucerne, Zürich, and Berne, and by areas like Glaris. An alliance in defence against the Emperors, it was mainly a confederation for war purposes. Developing haphazard it became a tangle of alliances rather than a single confederation. But continuing co-operation emphasized common traditions and interests. Independence of the outer world increased. A feeling of union and a sense of common destiny developed. The confederation was to remain in being until it was destroyed by the armies of the French Revolution. But despite its lengthy past the confederation at that date was little more than a league of sovereign nations, resembling the modern League of Nations, with all its internal divergencies and conflicts, far more than a federal state.

It was composed of two distinct types of political system. The democratic element, which had originally formed the league, still survived in six Alpine communities governed by annual meetings of all male citizens. These included, besides the first three, Glaris, Zoug, and Appenzell.

The second type was the urban oligarchy. This was a system which combined two principles, hereditary aristocracy and the medieval town government by privileged trading groups. It was in the main a survival of the gild system by which voting rights belonged only to the few who were admitted by a process of co-option to trading privileges. These cantons numbered seven and were economically and by numbers the most important. They were Zürich, Berne, Basle, Schaffhouse, Lucerne, Fribourg, and Soleure.

But around this main league there were grouped associated, though non-member, areas, bound by one form or another of alliance to a member canton. These later became full members of the confederation. Among them were Geneva, the Grisons, Valais, the principality of Neuchâtel, and the bishopric of St. Gall.

The different methods of government in the confederation proved to be an important cause of conflict. Civil war between 1442 and 1450 with the oligarchic cities on the one side and the democratic cantons on the other, did much to weaken the union. But it resulted in reaffirmation of the confederation on the basis of the blessed principle of non-intervention. Each area was to maintain its own system of government. This divergency, however, was probably the chief reason for the failure of a more complete form of union to develop. A federal state composed of units of such different economic and political structure, each jealous of its own traditions, was hardly likely to emerge. But if the union remained loose, and thus became weaker, the adoption of this principle of non-intervention enabled it to become wider. Basle and Freibourg were among the new entrants.

Nor did the Swiss escape the religious wars which followed the Reformation. Themselves originating one branch of the Protestant movement, they were in fact at the centre of the struggle. For some time there were what amounted to two separate leagues within the confederation, Protestants and Catholics holding distinct diets. This further strengthened the forces of disruption within the union. The cantons were weakened by the necessity to accept support from outside the confederation to carry on their internal conflict.

It is important, however, that while religious, economic, and political factors made for disunion, the Helvetian League had a common language for the first five centuries of its existence. The linguistic basis of union was strengthened by a general spirit of independence, by a habit of alliance, and by a tradition of collaboration for military purposes. These factors ultimately proved stronger.

But at the time of the French Revolution the confederation was no more than a loose league of nations. There was nothing that could be easily recognized as a Swiss state. The league's assembly or diet was little more than a conference of ambassadors from independent states. There was no federal army or treasury, or national citizenship. Decisions by the diet bound only those who acceded to them; and were thus merely recommendations to the sovereign authorities. These even made their own commercial treaties with foreign powers. United action was generally impossible, and a common foreign policy seldom existed.

It is hardly surprising therefore that when Swiss territory was invaded by the French in 1798, the confederation collapsed. But the new constitution imposed by the French, drawn up by them with the help of Swiss revolutionary democrats, was to facilitate the development of a closer and more effective union.

The Helvetic Republic established in 1798 was composed on the constitutional model popular in France at the time. It was proclaimed as a republic "one and indivisible." A strong central government was set up, consisting of Senate, Grand Council, and Directorate. The cantonal boundaries were disregarded, being replaced by twenty-two departments on the French pattern, each with its local legislature.

But the most important change was the general application of the revolutionary principles of liberty and equality. The town oligarchies were overthrown. A common democratic suffrage was created. Freedom of the press and of religion

was established. Judicial, financial, and educational institutions were reformed.

The tradition of independence proved too strong, however, and revolts occurred, especially in the democratic cantons. Hatred of the French army of occupation spread rapidly. It was not diminished by the fact that the French-speaking areas, previously subjected or merely allied to the league, had been incorporated in the Republic. When the French troops were withdrawn the Republic proved unworkable. Swiss representatives were summoned to Paris to draft a new constitution under the direction of Bonaparte, the First Consul, and with the guidance of four French senators.

The result was the Act of Mediation decreed by Napoleon in 1803, under which the Swiss were governed until his fall in 1814. This new constitution combined the liberal principles of 1798 with a far more realistic appreciation of the peculiarities of Swiss traditions. It restored the old cantonal divisions and created fresh cantons for the new areas incorporated, creating a federal and nineteen cantonal constitutions. All the governments were made democratic or representative. Of particular significance is the fact that unequal representation for unequal cantons was made a fundamental feature, six being recognized as the most important. The re-established diet was composed of from two to six representatives from each canton. The office of president was created, to be held by the chief of each of the six cantons in turn.

The Act of Mediation was largely a codification of the laws and customs which had shown their usefulness before 1798. To this was added the principle of liberty and equality among citizens, carrying with it the natural corollary of inequality among cantons. By abolishing the survival of feudal privileges it prepared the way for future union, that could be based on a common political ideal of democracy.

But being the work of Napoleon, this constitution,

excellent though it was, naturally suffered his fate. Reaction dominated Europe, and the attempt was made in Switzerland as elsewhere to restore the pre-revolutionary system. The new constitution, known as the Pact of 1815, was largely the result of the clamour of dispossessed interests, and was imposed by the Allied Powers at the Congress of Vienna.

The Pact of 1815 restored the oligarchies, but it proved impossible to reassert all the earlier privileges, and the previously subjected areas insisted on retaining their new status. Three new cantons—Geneva, Valais, and Neuchâtel—were included in the confederation, which thus came to consist of the twenty-two cantons of which it is composed today. The principle of maintaining the new *status quo* by force was accepted, the national diet being given power to intervene with troops in any district where revolt threatened. Thus the authority of the central government was reaffirmed; but a step backward was taken, not only in the restoration of aristocracy, but also in the return to the principle of cantonal equality, which meant that Uri with a population of 12,000 was made equal with Berne which had 300,000.

The experience of liberty was not forgotten, however. When once the restoration had shown its weakness in the Paris revolution of 1830 revolt broke out among the Swiss. The support of the Holy Alliance powers not being forthcoming, the cantonal constitutions established under their influence collapsed on all sides. Nine of them were reformed in 1830, that of Berne following in 1831, and of Basle in 1832. The Swiss diet took no steps to maintain them, but on the other hand refused to guarantee them. The more radical cantons of Berne, Zürich, Lucerne, and four others formed their own "League of Seven" within the confederation. Feeling threatened, six other cantons formed another league and withdrew from the diet. This was dissolved by force by order of the diet.

But the succeeding years saw further conflict. A separate

Catholic league was formed in 1845. In 1847, however, the army of the Catholic league was crushed by the federal army under General Dufour.

The minority cantons, opposed to the liberal reforms, and to the claims to the exercise of federal authority by the diet, claimed that the constitution of 1815 was an international treaty and as such could not be altered without the unanimous consent of all the cantons. They were afraid that the revision of the federal constitution desired by the majority to bring it into conformity with the liberal changes would diminish their rights as sovereign states. It was only after they had been defeated by force that they could be brought to accept the desired revision of the constitution. This took place in 1848. The period between 1830 and 1848 bears a certain resemblance to that in America between 1776 and 1789. It was marked by the same change from a loose confederacy to a federal state.

In the story of the growth out of the loose Helvetian League of a closely knit federal state, the period of French and Allied dominance between 1798 and 1830 has an extremely important part. If the foundations of union were already there when the French invaded Swiss territory, foreign domination removed several obstacles which had hitherto prevented its development, and established the expediency of several principles which might never have been accepted without the experience of their practical advantages.

To live for a few years, even though it was at the point of the sword, as a republic "one and indivisible" undoubtedly helped to prepare the way for later union. Curiously enough, when the Swiss were confronted with the problem of building an effective federal state in 1848 it was largely to the experience of fifty years before that they turned for guidance. They had then caught a glimpse of a united state founded on liberty and equality, and recognizing more than one official language. The advantages of a federal authority

strong enough to maintain, by force if necessary, the rule of law in each canton, experienced between 1798 and 1830, were reinforced by the succeeding period of disorder in which such central authority was absent. The acceptance of divergent political ideals, accompanied by the doctrine of non-intervention in the internal government of the cantons, had shown itself conducive to civil war long before. This recent experience emphasized that lesson.

The constitution of 1848 marked the triumph in federal, as in cantonal, government of the liberal principles of 1830. Indeed the spontaneous Swiss democratic movement of 1830 contributed the outstanding features of this development. The idea of the popular referendum as the sole sanction of a constitution, or of its amendment, adopted in 1848 was characteristic. It also distinguishes Swiss federal development from American.

On the other hand, the American example was added to Swiss experience as an influence on the form of the constitution of 1848. The fears of the smaller cantons that they would be swamped by the greater power of the larger cantons were met by the creation, as in America, of a second chamber in the legislature where all cantons, regardless of their importance, were given an equal voice. But this marked a departure from the Swiss practice of single chamber legislative bodies, which had invariably been adopted except in 1798. The Swiss national diet gave place to a bicameral legislature in what is a federal state, although it is still called a confederation.

While in the second chamber, or Council of States, each canton has two representatives and determines for itself the method by which it shall elect them, in the first chamber, or National Council, the number of representatives is proportional to population. This means that at one end of the scale Berne elects thirty-one deputies, and at the other Uri elects one.

These two chambers, forming the Federal Assembly, meet jointly to elect the Federal Executive. This was permanently seated for the first time in one place in 1848—at Berne. It consists of seven members, not more than one from any canton, being chosen by the Federal Assembly immediately after the election of the National Council, which takes place every four years, the tenure of office having been increased in 1931 from three years.

It is significant that, although the Swiss imitated the American Congress, they rejected the idea of a nationally elected president as chief executive. Such an office, they said, meant a dictatorial tendency wholly alien to Swiss views. Government by councils, as the committee which drew up the constitution pointed out, was far more in keeping with Swiss habits.

Similarly, the chief judicial organ of Switzerland derives its authority from election by the Federal Assembly.

It thus becomes clear that the American idea of checks and balances between the three organs of the federal state, each having comparatively equal claims to the exercise of power, each having its own separate sphere of jurisdiction, each able to prevent the other from failing to observe the fundamental laws, each acting as a check on the activities of the others, is no part of the Swiss constitution. This comes far nearer in fact to accepting the central principle of the British system, of the supremacy of Parliament.

It is worth notice that the Council of States was the chief centre of leadership for the first few years of federal union, but gradually its place of pre-eminence was taken by the National Council. Being both more numerous and more representative it became more influential. But the provision for joint action for certain important purposes, and for equal powers, means that in some ways the Swiss legislature resembles a unicameral rather than a bicameral system.

The powers conferred upon the federal authority included

the conduct of foreign relations, separate alliances between cantons and foreign states being expressly forbidden; the control of customs, coinage, and posts and telegraphs; a loose supervision of troops raised by the cantons, with the right to employ them as federal troops if disorder threatens. This last power has in fact been used on several occasions. Although in the first article of the constitution the cantons are described as the "twenty-two sovereign cantons of Switzerland," although they were given, and still have a more immediate contact with the citizen than has the federal government, and although unreserved powers belong to them, they are in reality anything but sovereign. The cantonal constitution must assure political rights to its citizens. It must be accepted by a majority and contain nothing contrary to the federal constitution. With these provisos it is guaranteed by federal force.

But the powers of the central government have been constantly increased by constitutional amendment since 1848. In particular the changes of 1874, when a thorough-going revision took place, were a move in this direction. Social legislation, income tax, greater and more direct control of the army, a federal bank, the nationalization of railways, and of water-power have all indicated the same tendency.

4. CANADA

When we compare the development of federal states within the British Commonwealth with development elsewhere one fact immediately springs to attention. It is the existence of a sovereign Imperial Parliament. This has meant that the problem of the sovereignty of the smaller units has not been raised. It has provided a safety valve, for it has avoided the need for complicated arrangements for constitutional amendment and interpretation, Parliament being already available

for the former, and the judicial committee of the Privy Council for the latter. A common citizenship in allegiance to the Crown has preceded federation. The Imperial Government already controlled defence and foreign relations, and therefore no sacrifice was entailed, save on the part of the Imperial Government itself, in the delegation of such powers to a dominion federal authority. Indeed, it might be said that the rudiments of federalism were already in existence and that all that occurred was the substitution of a dominion for an imperial union.

The story of Canadian evolution into its present federal form covers a rather shorter time than that of the United States. True federalism does not appear for more than half a century after its emergence in the United States.

Governed as a royal province of France from 1534, what was later to become the chief part of Canada was administered autocratically like France itself. As contrasted with the separately chartered and largely self-governing colonies of New England, New France did not suffer from disunity but from apathy. It had finally passed to England by 1760. Between 1759 and 1764 it was under military control. In the period 1764 to 1774 it was ruled, much as it had been under the French, with a George instead of a Louis as its sovereign, and a Governor assisted by a Council acting in his name. The effect of the Quebec Act, 1774, was, under the influence of the American war of independence, merely to enlarge the Governor's Council. The Constitutional Act of 1791, however, made very important changes. It was, in fact though not in name, a real step in the direction of a federal system, for it recognized the fundamental divergencies that separated the areas peopled by the French from those colonized by loyalists from the United States and emigrants from England. It divided the Quebec area into Lower and Upper Canada. Afraid of trouble in the coming war with France, the British Government aimed at satisfying

the French element through separation. Indeed, it was a remarkably far-sighted vision that Pitt revealed. Separation was to satisfy both races, and by satisfying them to unite them in the end. The path to contentment and union was not to prove in fact a straight and easy one, but the first step along it was taken in 1791.

Although the Constitutional Act showed vision in this one respect, it established a system of government in each province entirely out of harmony with the moving spirit of the times. It was an effort to transplant the British Constitution of the day with all its aristocratic privilege. If the House of Assembly was based on a rather more liberal franchise than the contemporary House of Commons, the upper chamber or Legislative Council represented nothing but property and privilege. It soon became the target of bitter attacks, as "the servile tool of the authority which creates, composes and decomposes it." Similarly, the "vicious composition and the irresponsibility" of the cabinet or executive council was attacked. The irresponsible land-granting department and the accumulation of offices in the hands of the families of legislative councillors were further grievances. The long quarrel between the French-Canadian Assembly of the province of Lower Canada and the home government was accompanied by reminders of 1776 and threats of revolt. Papineau, leader of the democratic movement with its demand for an elected Legislative Council, was successful in the election of 1835. After that, the Assembly cut off supplies, and expenses had to be met by borrowing. The British minority, with the experience of the Assembly before it, was afraid of an elective second chamber where it would be submerged.

At the same time in Upper Canada a somewhat similar situation developed. Revolt broke out here and was followed by insurrection in Lower Canada, revolutionary and independence movements. As a result the constitution was

suspended and Lord Durham was sent out from England with full powers in 1838.

Lord Durham's Report marks the turning-point in Canadian constitutional history as in British colonial policy. But for the moment it was repudiated. He resigned. While he had recommended a federal system with legislative supremacy at the centre, subject to Westminster, and had favoured responsible government, the Act of Union which followed in 1840 adopted neither principle. Nevertheless, from this time movement was in the direction of Lord Durham's policy.

Lord Durham had argued that federalism within Canada was the solution of racial differences. He had pointed out that the British minority in Lower Canada, combined with Upper Canada, gave a slight superiority in numbers to the British element. He thought that a federal combination of the provinces would produce a national unity resting on a national pride in their difference from the republic of the United States. If given freedom on these lines it would be a loyal and friendly nation. Administrative needs—customs, currency, communications, and postal service—demanded union. Even for Lord Durham, however, self-government did not mean the control of foreign relations, trade, Crown lands or military defence. But the granting of responsible self-government on this model would, he believed, satisfy popular aspirations and lead to the natural triumph of British methods and institutions over French separatism.

What the Act of Union did was to establish a single Parliament with equal representation for the two provinces. It did not set up responsible government; but by 1848 this had become the practice, for the Governors had found it necessary to choose men with the backing of a Parliamentary majority to form their executive councils. The union, however, was superficial. Each province had to be treated as a separate entity with its own language and its own

political leaders. A dual majority was necessary with, in effect, two first ministers. Governments were frequently defeated. Administration proved expensive because every time money was spent in one province an equivalent had to be spent in the other. Jealousy between the two provinces and the two races found a new strength in the desire of Upper Canada to end the principle of equal representation for the two provinces in the legislature. In 1840 the French Canadians had been more numerous, but Lower Canada had only been given an equal voice. Twenty years later the preponderance had shifted to a marked extent in the other direction, and was leading all parties in Upper Canada to demand a population basis for representation. To Lower Canada this looked like the betrayal of a fundamental principle which it had been forced to accept when to do so was a disadvantage.

When, in 1858, the Canadian Government made an open demand for a federal union of British North America, it was already clear that the actual constitution was highly unsatisfactory, if not that it had broken down. In fact the federal idea had been progressively taking hold of more people's minds as the defects of the abortive attempt at a single legislative union were being more clearly revealed. In many ways this advocacy of federalism was a counsel of despair; it seemed like the only hope of preserving any system of co-operation and order at all. It was not possible for federalist proposals to be made until responsible government had been granted and had prepared the ground, but this had happened in the few years after 1848 not only in Canada, but in New Brunswick and Prince Edward Island.

There were many other causes of the growth of federalist opinion, and it is not easy to say which were the strongest. Fear that the Americans would move into the west and cut off the route to the Pacific was coupled with the knowledge that only a united and forceful Canada could hope to fore-

stall such a movement. Railway interests saw their best, if not their only, hope in such a union; and it is difficult to over-estimate the potency of this economic factor. The example of American federalism was at hand: it clearly suggested the advantages of the federal method of developing large, unsettled territories, as yet lacking communications. But, from 1861, the American civil war was also teaching the lesson of the dangers of establishing too weak a central government. Again, the possibility of war between England and the United States, during the period of Palmerston's aggressive conduct of British foreign policy, accentuated the dangers of disunion. Fear too of the consequences of the termination of the Reciprocity Treaty with the United States in 1866 was a factor. Finally, there was a further economic cause in the desire to end restrictions on trade between the colonies.

The Quebec Conference of 1864 was a response to these conditions. To it came representatives of Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and of each province of Canada, each area voting as one. The Conference agreed that "the best interests and present and future prosperity of British North America will be promoted by a federal union under the Crown of Great Britain." Between October 10th and 29th they passed seventy-two resolutions implementing that view. These resolutions were to become, with but slight alteration, the British North America Act of 1867. They looked to the creation of a general government charged with general functions, and of local governments giving opportunity for the characters of the different provinces to be freely expressed.

The preamble of the British North America Act states that "the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united." But in fact there was much opposition to the proposal, including its temporary repudiation by Nova Scotia, New

Brunswick, and Prince Edward Island, and violent mutual distrust among the Canadian leaders. By dint of skilful advocacy and leadership, however, it proved possible to send delegates to London at the end of 1866. In the meanwhile the Canadian Parliament, treating the resolutions as an international treaty which could not be amended but must be accepted or rejected as they stood, had approved them by 91 to 33 votes. It had also made provision for setting up two provincial legislatures for local purposes. New Brunswick, although it had approved the resolutions by a large majority, had made them provisional upon the immediate construction of a railway linking the province with Canada to the west and Nova Scotia to the east. In London the resolutions were agreed by a unanimous vote on December 24th. To avoid agitation by private interests, the Bill, which was rapidly drafted in accordance with the resolutions, was kept secret until the last moment. It was passed on March 29th, 1867. No modifications of any significance were made by the action of the British Government.

While the Act created a new combination of provinces it also represented a disintegration, for local government purposes, of Upper and Lower Canada. Federalism was thus expressed in two opposite tendencies. The federal union was small compared with what it was to become. The Province of Manitoba was admitted by the Canadian Parliament in 1870; and this was confirmed by the Imperial Parliament in 1871 in an Act empowering the Canadian Parliament to add new provinces when required. British Columbia was admitted by Order in Council in 1871, Prince Edward Island in 1873; Saskatchewan and Alberta were carved out of the north-west territory in 1905. The idea of a greater Canada, which had been one of the inspirations of the federation movement, was thus given shape in the six years following the union, and a trans-continental railway was made the backbone of unity in the growing dominion.

The "high functions and almost sovereign powers" which Lord Carnarvon said it was the intention to confer on the central government, combined with an "ample measure of municipal liberty and self-government," were in fact much greater than had hitherto been given to federal governments elsewhere. The central Parliament was composed of two chambers, the House of Commons elected on a population basis, and a senate of members to be nominated by the Governor-General in such a way as to provide "permanent representation of sectional interests." The conception of provincial autonomy was therefore given much weaker expression than in the constitution of the United States.

Indeed, the differences from the American constitution are marked. They all tend in the direction of stronger central government. The causes to which they are to be attributed are various. Canadian federalism comes later, when the needs for a strong central authority are more clearly seen, if only from American experience. Particularly is the need for central control of economic development apparent, it is emphasized by the preoccupation of Canadians at the time of their federal union, as distinct from Americans at the time of theirs, with inter-colonial communications, canals and with railway development especially. If there is the same fear of foreign encroachment as a motive of union, the existence of a common authority at Westminster makes federation appear both less final and less hazardous. But at the same time, it is true that the Canadian constitution is nearly as much the work of its own citizens as is that of the United States. As has already been pointed out, the problem of sovereignty which hindered American and Swiss federalism did not arise and was not discussed. Undoubtedly, British constitutional experience played as great a part in shaping the thoughts of the makers of the Canadian federal system as of the American system, but the ideas of Montesquieu were no longer regarded as the right interpretation

on the contrary, the importance both of the supremacy of Parliament and of the close association with it of the executive arm of government was now clearly seen.

The result of these several factors was the creation of a central Canadian legislature, resembling the British as much or more than the American. In contrast to Congress residuary or unspecified powers were left to it and not to the provincial legislatures. The possibilities of deadlock through an attempt to balance and separate powers was consciously avoided. It was not necessary to make any special provision for a federal executive or judiciary because the Crown was accepted as a part of the constitution; the appointment of Parliamentary leaders as H.M. Government in Canada could follow the same lines as in England; the judicial committee of the Privy Council could be appealed to in matters of interpretation, as could, in the last resort, the Imperial Parliament. It is interesting that practically the only contribution of Westminster was to render the second chamber slightly more elastic and therefore, like the House of Lords, amenable in some measure to discipline by the Parliamentary majority.

In each province its own legislative system was maintained, but power was given to it to amend itself, and under that power several have abolished their second chambers. The grant of powers, however, was not a large one. They include taxing, borrowing, and employment of officials for provincial purposes, prisons, hospitals, the management of provincially owned lands, the granting of certain licences, local works and undertakings (except railways, canals, telegraphs, other than purely internal shipping, and anything "declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces"), the enforcement of provincial laws, and "generally all matters of a merely local or private nature in the Province." Education, though a provincial concern, was

made subject to central supervision and to constitutional provisions safeguarding denominational rights.

Any matter not specifically reserved to the Province comes within the jurisdiction of the federal government. It is needless to mention these powers, which range from "the raising of money by any mode or system of taxation" to the postal service, defence, and the regulation of banking, commerce, and naturalization.

The Canadian Parliament is not an authority delegated by the Imperial Parliament or by the Provinces. Its powers are unlimited within its own sphere. Thus, at least, subsequent interpretation has determined. Recognition has thus been legally accorded to the political reality, for its nature and powers were in fact decided, as we have seen, by a conference of Canadian representatives. Similarly, Provincial Parliaments are not delegates of either the Canadian or the Imperial Parliament, but are also autonomous within their competence.

Relations between Canada and the home country have added a further factor not present in federations outside the British Empire. At the outset certain powers were reserved to the Home Government. It was possible for Acts of the Canadian Parliament to be disallowed by the Crown, acting through the Governor-General or on the advice of the Home Government. Foreign relations, in particular, were reserved. The Governor himself was appointed from London. By a gradual evolution, culminating in the Statute of Westminster, dominion status has become complete independence in each of the above respects. But it is not without importance to the student of federalism that the powers of the federal authority have thus only gradually been built up to complete statehood. In a sense it has meant merely that what was in fact already a federal connection, between Province, central government in Ottawa, and imperial unification in London, has been changed by the transfer of the ultimate

authority from the Imperial to the Canadian Government. Changes in law have followed upon changes in practice. It has been possible for political reality to grow without being laid down in advance; and thus the development has been facilitated and simplified.

5. THE UNION OF SOUTH AFRICA

The South African constitution, originally expressed in the South Africa Act of 1909, is marked by the practically complete supremacy of the Union Parliament. It might seem, therefore, that it ought not to be regarded as a federal system at all, or to be considered here. By reason of this principle of Parliamentary supremacy great emphasis has been laid in most accounts of the constitution on what is claimed to be its unitary character. If, however, its legal form is almost entirely unitary because the Parliament can do anything by simple majority, except alter the Cape native franchise and language rights, which requires a two-thirds majority in both Houses, nevertheless, the political reality shows many federal characteristics. The Union is composed of several separate units. Each of these has its own history of an independent existence before the Union. The distinct entity and boundaries of each have been maintained in the Union. The provincial legislatures are not delegates of the Union Parliament, but original legislative bodies. Their statutes are not mere bye-laws, but have the full force of law within the province, so long as they are not repugnant to an Act of the Union Parliament. They can repeal or amend laws passed prior to the Union. Moreover, analogy has been drawn in judicial decisions between the provincial authorities of South Africa and those of Canada. "The fact that under the South Africa Act provincial statutes may be overridden by a Union statute does not make the provincial councils sub-

ordinate legislatures to the Union Parliament. Within the scope of their authority their powers are as plenary as those of the Dominion provincial legislatures."

In its origin also the Union constitution has several traces of federalism. To understand this it is necessary to look briefly at the development both of the separate units and of the federal movement which culminated in their combination. That this combination went further than in most other cases towards the creation of a unitary state only renders it the more essential to examine the causes which made the process more complete. For essentially it is the same process. If we examine constitutional development historically and dynamically this is perfectly clear; it is only when we make purely static, and therefore unreal, comparisons that any fundamental contrast appears.

The most important colony is that of the Cape of Good Hope. It was settled by the Dutch and administered by the Dutch East India Company from 1651 to 1795. It was then ruled by a Governor acting with a council and delegating administrative powers to local "landrosts" who in turn were assisted by six burghers of the district or "heemraden." A representative council was being proposed when the colony surrendered finally to the English under Sir David Baird in 1806. This early period is important because, as well as the Dutch settlers themselves, several political features have continued down to the present time. These include some Roman-Dutch law, enactments of the Netherlands legislature, and the local administrative system.

Absolute responsibility in the Governor, under the Instructions of 1796, marked the following years. There was an influx of English settlers, especially in 1820, and they soon demanded representative government. A commission of enquiry was sent out in 1823 and a council was appointed in 1825. There were further demands for self-government. In 1834 a legislative council was created, but it was still a

nominated one, of five executive officers and five others. Discontent continued, breaking out finally into mob law in Cape Town in 1849.

The period of representative government begins in 1850 when the Colonial Secretary empowered the Legislative Council to draw up a constitution. This was enacted by ordinance of the Governor in 1852, and in 1854 there met the first parliament on African soil. The ordinance set up two Houses, the one on a relatively liberal franchise. It also established a principle which remained a proud part of the Cape political creed: the vote was given to a male adult *of any colour* having property worth £25 or earning £50 a year. This allowed a few native and coloured British subjects to vote. Later, being proudly clung to by the Cape leaders, it was to prove an obstacle to union; but it was continued with special safeguards to secure its maintenance in the South Africa Act.

The representative system, however, was unsatisfactory. Deadlock developed between the Chambers and the Governor. The change to responsible government came in 1872 without legislation, but with the simple intimation that in future ministers should hold office only while enjoying the confidence of the Legislative Council and Assembly. The former was a small body of fifteen members with a high property qualification, elected by the Colony in two constituencies. The Assembly had forty-six members elected in two-member constituencies, qualifications for election being the same as for the vote. Under this system the Colony was governed until it disappeared into the Union.

The early settlers from the Cape who formed the colony of Natal were ruled by a committee of management. Further emigration and the trek of the Dutch farmers led to a new system of government under a Volksraad or people's council, popularly elected by the white settlers. This was not recognized by London, and Natal was annexed by royal pro-

clamation in 1843. It became a Crown Colony in 1847, being administered by a lieutenant-governor, first as a district of the Cape, and then in 1856 with a separate government on a representative basis. Under the Charter of Natal, 1856, a Legislative Council of twelve elected and four nominated members was established, the Governor and Council being given power to amend the Charter.

Natal was in any case peculiarly dependent on British protection. The settlers had been annihilated in 1838. There were only some 30,000 whites to half a million Zulus. The racial question was complicated by the importing of some 25,000 Indians for labour purposes.

Responsible government came in 1893 through a Constitution Act passed by the Governor and Council. The Legislative Council now consisted of eleven nominated members chosen to represent defined areas. The Legislative Assembly of thirty-seven members was elected on a franchise that included a very few natives. In 1897 Zululand was subjected to this Natal Parliament.

The disastrous policy of allowing the creation of separate and independent colonies was still further accentuated in the case of the Orange Free State. This colony was founded by emigrants from the Cape and Natal, British sovereignty being established by proclamation in 1848. Rule was by a British Resident with a nominated council until in 1854 sovereignty was renounced owing to the cost of defence. Authority was handed over to the Dutch delegates, the British Government guaranteeing independence. Thereupon a highly democratic constitution was framed, with a single and supreme legislative chamber, the Volksraad, and a president elected for five years on a popular vote. The executive was made responsible to the Volksraad. There were guarantees of freedom and a franchise extending to all the white population. This system worked with great success and continued in operation until the Boer War; after which

it reverted to a Crown Colony till in 1907 responsible government was again granted.

The Transvaal resembled the Free State. It was formed from a union of smaller republics in 1858 and was governed on the same system as its neighbour. Both states were based upon the principle of no equality between white and black population. Between 1877 and 1881 the Transvaal was inside the British Empire; but its independence was restored, and specifically recognized in the London Convention of 1884. Apart from one or two constitutional changes in 1890, such as the addition of a second chamber which could legislate on restricted subjects specially concerning the large immigrant population, the Transvaal political system remained in existence till the Boer War. After that it became a Crown Colony under the same Governor as the Orange River Colony, with a legislative council and assembly, responsible government following immediately. The Transvaal amended its own constitution. It provided that in the event of disagreement between the two chambers they should sit together, a method continued under the South Africa Act.

Thus it is clear that these colonies had become independent, self-governing, and of equal status before the date of union. They were legally linked only by their common connection with Great Britain, which exercised some federal functions for them, such as the appointment of a nominal chief executive, the control of a common citizenship, defence, and foreign relations. But they were faced by several urgent common problems, especially native policy, and their history showed many similarities. On the other hand, it might have been expected that their disunion would have been fatally increased by the war through which they had recently gone, and which had separated the two elements, Dutch and English, that in varying proportions composed them all.

The Union of 1909, however, was no sudden or accidental event. For the previous fifty years there had been signs of

movement in that direction. It can be properly understood only by reference to these, and, secondly, to the economic and social causes which finally called it forth.

In 1858 leading citizens of the Orange Free State, now—it must be remembered—wholly independent of the British Crown, petitioned Sir George Grey, Governor of the Cape, for federation. Grey, who thoroughly approved, forwarded the petition to London, and publicly recommended the Cape Parliament to consider it. Unfortunately, the British Government at this time was, as it replied, "not prepared to advise the resumption of British sovereignty in any shape over the Orange Free State." Nor had it yet developed the faith in federal union of a few years later. Grey was recalled in disgrace for causing "a position of extreme embarrassment and difficulty," and was only allowed to return by a new Secretary for the Colonies on condition that federation was not discussed. British official opinion did not change until after the passing of the British North America Act. In 1872 the House of Commons, with its Liberal majority, passed a resolution favouring confederation. In the meanwhile public opinion favouring union continued in South Africa and became allied with South African nationalism. Sir Henry Barkly, Governor of the Cape, in 1872 pointed out to the Cape Parliament the advantages of federation in the way of economic and administrative improvement, and in making possible a more consistent policy in relation to the natives. Lord Carnarvon, who, as Colonial Secretary, had been associated with Canadian federation, now proclaimed this as his policy when appointing a new Governor. In 1877 an enabling Act for union was passed, with a time limit of five years.

British efforts at encouraging federal development, although they recognized that to succeed it must be the fruit of a spontaneous movement, were resented as outside interference. By this time, too, the Orange Free State had

become afraid of being submerged in a federation; and the attempt failed.

Economic factors were exclusively responsible for bringing federalism to the fore again, but they were not to become operative for many years. A customs union between the Cape and the Orange Free State was formed in 1889. During the next ten years it was joined by Natal, Basutoland, Bechuanaland, and Rhodesia. It was renewed, with the Transvaal included, in 1903.

The annexation by Disraeli's Government of the Transvaal in 1877 had strengthened the fears of British interference. Once the Zulu danger had been removed by British military action, a strong Boer nationalism grew. This for long stood in the way of South African union under leadership by the British element for it was hostile to the British connection and in competition with it for the direction of South African development. This enmity was combined with the refusal to allow full rights of citizenship to the large body of immigrants who came in to exploit the gold mines of the Rand. Not until economic and political competition had been resolved by war was union possible. But the immediate occasion of it was economic in character.

After the formation in 1903 of an inter-colonial council there was a growing movement in favour of union; 1907 is the year in which the Cape Parliament unanimously approved a motion to approach the other South African governments on the subject, and also of Lord Selborne's report. This latter *Review of the Present Mutual Relations of the British South African Colonies* has often been compared with Lord Durham's Report. It argued that disunion was artificial because there were no natural or physical barriers between the colonies, and because the Dutch and British were intermingled in all. Reasons put forward for union were manifold. Among them were the need for railway co-ordination, fear of the commercial consequences of a tariff

war, the legal complications involved in several different sets of laws, the need for a common sanitary and epidemiological administration (the locust pest, for instance, was apt to pay little respect to political frontiers), the need for similar labour laws, especially with regard to the natives, and the fact that under the existing system government was "inefficient, cumbrous and expensive." Finally it was argued that the result of having four different policies on the colour question in force was to render each of them unsuccessful. "Different policies applied at the same time," as Lord Selborne wrote, "in different parts of the country to the same races, the members of whom are in constant communication with one another, must together defeat the object at which each severally aims." Unfortunately, however, while the native question called for unity, it also stood in the way of unity because different policies were favoured in different colonies.

The immediate cause of union was not native policy but the tariff and railway questions. The customs union, which had only been arrived at with the greatest difficulty, showed signs of breaking down almost as soon as it had been accepted. Conflict between the Transvaal and the Cape on railway rates brought them to the verge of war. Later, under the intercolonial council the railway systems of Transvaal and the Orange River Colony were united. But there was keen conflict between the publicly owned railways of Natal, the Cape, and the Transvaal-Orange system. State ownership exacerbated the competition by adding political factors. It was further complicated by the tendency of the northern system to use the Portuguese port of Delagoa Bay to the detriment of colonial ports, which brought European political considerations into the conflict.

A conference met at Pretoria in 1908 to deal with the tariff and railway problems. This recognized and agreed that it could not solve either problem on the basis of the

prevailing political system, but that on the basis of political union both could be satisfactorily dealt with. A national convention was therefore summoned, and met at Durban in October 1908.

The National Convention completed its work in Cape Town in February 1909. Composed of political leaders, many of them of great experience, two-thirds of whom had only a few years before been conducting a war on opposite sides, it nevertheless pursued to a successful conclusion the common end of South African union. Many opposing interests had first to be reconciled. The desires of Englishmen and Boers, town and country, industry and farm were in many ways hostile to one another; but agreement was reached and loyally supported, the Transvaal taking an honourable lead both in initiative and in support. The proposed constitution having been approved by the Convention had then to be submitted to the legislatures of the four colonies. Natal, in particular, with its mainly English population was afraid of being submerged in a predominantly Dutch combination and would have preferred federation to the almost complete unification approved by the Convention. But when the work of the Convention was submitted to a referendum in Natal it secured an unexpectedly large majority. A friendly spirit at the Convention and ultimate agreement were undoubtedly furthered by the early and ready acceptance by the English of the principle of two official languages with equal rights.

Slight amendments and compromises were made to satisfy the sectional interests which expressed themselves when the accord was submitted to the colonial legislatures. With these changes the constitution was finally approved by the Convention sitting at Bloemfontein in June 1909, to be passed later in the same year by the Imperial Parliament as the South Africa Act.

The main reason why unification, rather than federation

was the outcome of the deliberations in the Convention is quite clear. It is the relative insignificance of the territorial boundaries compared with racial differences and economic problems. Dutch and English were mixed in all the colonies; territorial frontiers in no way corresponded to racial divisions. It is true that there were many fears of unification. The Orange River Colony, being smaller, like Natal was afraid of being swamped in the union. The Transvaal was richer, and some thought that it might have to bear too heavy a share of the financial burden. The Cape wished to preserve the franchise of the coloured voters. But in one way or another the fears were removed, and the motives for unification were powerful enough to ensure its triumph.

But it is worth noticing here again, as in the case of other federal unions, that fear of extraneous influences played its part in promoting agreement. No one who examines the story of the growth of South Africa can fail to be impressed by a sense that the predominant issue has been relations with the coloured races. If the immediate causes of union were economic, there overshadowed those immediate causes the desire and need for unity to strengthen the hands of the white race, in a minority of one to five, for their dealings with the natives, as well as the immigrant Asiatics. This meant, too, that the very emphasis on racial difference which had encouraged federalism in Canada, here encouraged unification. When the racial distinction really present in men's minds was between white and black, it seemed doubly dangerous to stress the difference between Dutch and English. Besides, both of these were now anxious for a new start after a war which had done much to show the futility of enmity. Finally, the federal systems of Australia and the United States both suggested that the central authority was liable to be subject to friction between its component parts which weakened it for dealing with the problems confronting it.

The nature of the South African constitution has been mainly influenced by that of its constituent parts. The Cape exercised a greater influence because it was older and had already affected the other colonial constitutions. As it in turn in many respects imitated the British constitution there is a profound similarity between the political systems of England and South Africa. In the provincial administrations, however, the desire to avoid a stressing of party divergences led to a following of the Swiss method of constituting executive councils.

The leading book on this matter, *The Law and Custom of the South African Constitution*, by W. P. M. Kennedy and H. J. Schlosberg, has the following summary: "The battle for federation left its scars on the Union constitution, and the constitution of the Senate as well as representation in the Assembly, shows how bitter was the struggle. Therefore the Union constitution, though decidedly a unitary one, has distinct traces in it of federalism; but because they are traces only, and not outstanding characteristics, mere incidental digressions and not fundamental features, we can realize how decisive was the victory of unification over federation." The creation of three capitals, Pretoria for the civil service, Cape Town for Parliament, and Bloemfontein for the Court of Appeal, is one of these "scars." The method adopted for maintaining the native franchise in the Cape is another. And finally there was the provision submitting elementary and secondary education to the provincial authorities.

6. SOUTH AMERICA

On the American continent federalism is the dominant principle. South of the United States it has taken a variety of forms. But no one could claim that the South American states have revealed a genius for good government, and it

is not of necessity, therefore, a condemnation of federalism that it has sometimes proved ineffective there. While the English- and French-speaking states of the north have shown a strong tendency to coalesce, which has left the north with only two states, both federal, in the south the Spanish and Portuguese states are much more numerous. There also, however, several attempts have been made to combine. Some have succeeded; more have failed.

The Provincias Unidas de Centro América, composed of Guatemala, Honduras, Nicaragua, Salvador, and Costa Rica —to take one example—was dissolved, after violent struggles, in 1840. But there has been in subsequent constitutions a formal recognition of the continuing existence of a solidarity among them, that they are "part of the great central American nation." An effort in 1921 to reconstitute the federal Republic of Central America failed because the convention was not ratified. Similarly, Greater Colombia, comprising Colombia, Ecuador, Venezuela, and Panama, existed as what was more or less a federal system first under Spanish control and then as an independent state, but it too was dissolved in 1830.

Other federal developments, however, have succeeded. The federal form of state has been popular. Mexico, Brazil, Argentina, and others have found in it the solution of the difficulty of organizing large territories, often containing areas with experience and traditions of independence, into single political entities.

Argentina is in some ways typical of this South American development at its best. It has been one of the more successful in creating an ordered system of government. Although it is by no means exhaustive, it may be taken therefore as an example.

The Argentine was fortunate, perhaps, in that the lack of precious metals caused the Spanish Government to take little interest in its affairs. It thus developed at an early

stage a strong local independence. This spirit of independence in the towns and provinces came into the open especially after the Spanish withdrawal. The so-called period of anarchy between 1816 and 1829 was the result of the rise of local leaders opposing the attempts to establish a strong central government.

The Constituent Assembly of the United Provinces of the River Plate attempted in 1813, and again in 1816, to set up a national authority. Buenos Aires tried to impose a centralized government in 1819 and 1826. But provincial independence under its tyrannical, albeit "republican," rule succeeded in preventing the proposed destruction of its power. Indeed, it was only the fear of invasion by Brazil that brought the provinces sufficiently together to make possible the organization of a board of representatives of the provinces in 1820, or the constituent assembly of 1824. From this assembly emerged the attempt of 1826 to establish a unitary constitution on the model of 1819. But by this time the conflict with Brazil had been settled by the creation of an independent Uruguay, and thus the main cause of union among the provinces of Argentina had been removed. Anarchy and war followed the failure of 1826, as of 1819. Rosas, the leader of provincial federalism as opposed to centralism, set up a dictatorship which lasted until 1852. His methods, though ruthless, performed the service of destroying much of the tyranny of the local leaders, and there developed in place of the old oligarchies a spirit of equality which was to provide a useful foundation for the federal state created after his downfall.

In 1852 General Urquiza, who had defeated Rosas, summoned a preliminary conference of the governors of all the provinces. Although most of these had been originally appointed by Rosas, they agreed on the principle of a federal constitution, and they decided to call a constitutional convention which should proceed by majority vote. Meanwhile,

to prevent the revolts which had attended previous attempts at a centralized, as distinct from the actually intended federal, system, Urquiza was given the task of maintaining order. He was only partially successful, however. Buenos Aires, the chief province and only reasonable capital, seceded and formed an independent state.

Nevertheless, a constitution was drawn up. Pending a settlement with Buenos Aires, Paraná was made the provisional capital. It was ordered that the constitution should be submitted to Buenos Aires. All attempts at negotiation were of no avail. As the thirteen provinces had less than one-third of the population and only something like a quarter of the wealth of the whole, and as Buenos Aires was practically the only port for trade, it was clear from the outset that the union could not endure on its actual basis. The struggle with the secessionist state continued for several years. It culminated in war in 1859, in which the army of the provinces was successful. We thus have the curious and interesting spectacle of a federal union coming into force as a consequence of a military victory, the chief peace term being that the defeated state should join the union already formed by the victors. A new constituent assembly was to consider any amendments to the constitution of 1853 which Buenos Aires might propose. In fact, several changes were demanded and accepted. Thus came into existence the Argentine constitution of 1860 which has been in operation since that date.

This was modelled chiefly upon the United States and in form is practically the same. Congress consists of a Senate and House of Deputies. The former is composed of two members elected by each of the fourteen provincial legislatures and two by the Capital. They have a nine-year term with partial renewal every three years. The latter is elected directly on the basis of one deputy for every thirty-three thousand inhabitants, and has a four-year term. It is interesting to note the provision made when the constitution

was drawn up that "the provincial legislatures shall regulate the manner of holding the first direct election of the deputies; Congress shall enact a general law for succeeding elections." The Executive veto may be overruled by a two-thirds majority in both Chambers.

The President has a term of six years, but may not be re-elected until a further term has elapsed. He is chosen by an electoral college in each province elected in the same way as the deputies, but in practice, as in the United States, this has meant direct popular choice. His powers are similar to those of the American President with one important formal difference. Every one of his acts must be countersigned by a minister. The eight ministers were made individually and collectively responsible to Congress. They could attend and report to Congress, but not vote, and could not become members of either House. This was not intended to mean, and did not mean, at least for the first sixty years, a system of Parliamentary government like that prevailing in the British Empire and elsewhere. But it has opened the way to later movement in that direction.

In Argentinian history the President has been the most important figure on the political stage. Many factors have contributed to prevent the reduction of his authority by the assertion of legislative supremacy. Illiteracy, the lack of an informed public opinion, and the absence of well organized parties have been the most potent causes. The large number of official appointments made by the President have given him an influential power of patronage. The existence of a federal standing army and universal military service have also served to strengthen his position. For the greater part of its history, therefore, the Argentine has been accustomed to ministers who are the advisers and servants of the President rather than the leaders of Congress. But even so, this has not been as true as it has in the United States. The President is also the local authority of the Capital.

The division of powers between the federal government and the provinces is almost exactly the same as in the United States. "The Provinces retain all powers not delegated to the federal government. . . . They shall elect their governors, legislators, and other provincial officials without intervention by the federal government." Republican, representative government, common citizenship, the usual individual rights, are given the backing of constitutional law. The federal government is given the right to intervene in order to maintain the republican system and to support the lawful authorities in the provinces. This power has been used several times. On occasion, as might be expected, it has served sectional interests, although complying with strict legal requirements. A provincial opposition has won the favour of the President, or the President himself has objected to a provincial administration, and after the necessary riot or claim of electoral impropriety, new elections have been held by the federal authority in the hope of overthrowing the provincial government, a hope not always realized.

On the whole, the central government has enjoyed greater power than in the United States, and the provinces have been correspondingly less significant. The reasons are not far to seek. The Capital has always been relatively more influential because by far the most important area. The brief period of provincial autonomy was counterbalanced by the much longer period of centralized dictatorship. A tradition had thus been set up which was never destroyed. Above all, the lack of education in self-government, and indeed of education at all, meant that the most obvious authority more readily won popular loyalty.

There are other reasons, too, for the greater power of the federal government. The authority to suspend constitutional guarantees belongs to it alone and not to the provincial bodies. It was used in the early unsettled stage of the national political evolution, and strengthened unity. But, having

helped to establish ordered government and to increase the importance of the federal executive, it would seem to have served its purpose and it shows a tendency to disappear. Again, the increase of railway mileage from six in 1857, when the federal union was already in being, to 20,000 fifty years later has, as elsewhere, increased national unity. Increases in the sources of federal revenue have underlined this development. In 1892 the entire internal revenue system was made federal. To summarize, one might say that the increase in central authority may be attributed to three general factors. There has been a broad interpretation of federal powers, both to encourage order and to further such economic development as is implied by railway construction. Education has been increasingly a federal responsibility. And, thirdly, the wealth of the federal power relatively to the provinces has made them often dependent upon it for financial aid. Jointly these have meant that out of the sectionalism that followed the incorporation of Buenos Aires in the federation there have emerged strong tendencies towards national unification.

One final word needs to be said about the absence of a judicial supremacy in any way comparable with the United States. Although the federal supreme court of Argentina has, on occasion, declared congressional statutes unconstitutional, and although it has repeatedly maintained its acceptance of the American jurisprudence with regard to its functions, its acts of veto have in fact been rare and exceptional. The explanation lies in two facts. The belief in judicial independence is not so strong, and in the past sometimes with good reason, as it is in English-speaking countries, where as a principle it had already obtained general acceptance at the end of the seventeenth century. And, secondly, the respect for authority, especially in the executive, has been greater in the Spanish tradition than in the English.

Something needs to be said about the federal development of the Spanish Republic because it has several characteristics which distinguish it from other federations. Although the democratic Spanish Republic belongs now to history, its federalism was the first attempted application of ideals that have endured for centuries. It was an effort to solve the problem of different provincial loyalties that has existed as long. Unification by force, and the endeavour to suppress the individuality of the regions, which was a part of the policy of the Bourbon monarchy, had never succeeded in destroying the consciousness of local peculiarities. In Catalonia, in particular, the home-rule spirit has always survived.

The Republic itself was the fruit of an alliance between the reformist leaders and the Catalan nationalists. Its coming was prepared by the secret agreement between them that preceded the overthrow of the monarchy by several months.

In accordance with this agreement the constitution provided for the creation of "autonomous regions," and the first of these, the Generalidad de Cataluña, was rapidly established by an agreed statute which passed the Cortes on September 9th, 1932, less than seventeen months after the birth of the Republic. A similar statute for the Basques was passed later, and others were projected. The general outline of provincial autonomy was laid down in the constitution, including an indication of reserved and delegated powers, and the constitution also provided for the representation of each region on the supreme court, or Court of Constitutional Guarantees, which had the function of seeing that constitutional law and the regional statues were observed.

The Catalan statute, after assuring equal citizenship and equal rights for the Catalan and Castilian languages, established a Catalan Parliament and a President elected by it,

who should remain only as long as he retained its confidence. The Republic asserted the right to take military control on the invitation of the regional authority or, when the interest of order and the republican form of government was threatened, on its own initiative. Otherwise, internal security and the maintenance of the social services were placed within the jurisdiction of the Region. The Republic, however, could establish minima and ensure their application. The revenues of Catalonia were to consist of taxes ceded by the state, a percentage of non-ceded taxes, and certain further duties.

The federal nature of the connection was emphasized by the provision that the statute should not be amended by the same process as that by which it had been passed. For amendment there was required, first, either the initiative of the Region expressed through referendum and approval by the Regional Parliament, or the initiative of the Government of the Republic supported by a quarter of the Cortes. Secondly, such amendment required a two-thirds majority of the Cortes to become effective.

8. AUSTRALIA

Australia differs from Canada and South Africa in that there is no racial division. Unlike the United States, at the time of the union, there were no great contrasts of economic structure. The political development of the various colonies that compose the federation shows few disparities between them, and none of any importance. Four of the six colonies achieved responsible government at the same time. These were New South Wales, Tasmania, Victoria, and Southern Australia. To give separate colonial status to the northern territories of New South Wales, Queensland was created in 1859 and granted self-government at once. Only Western

Australia, which was colonized later, shows any difference, and then it is solely one of time. The demand for responsible government in 1874 was refused on the ground that it was premature for a colony of no more than some 26,000 inhabitants, but it was acceded to in 1890.

For these reasons of racial, economic, and political similarity it might, perhaps, have been expected that unification rather than federation would have been the outcome. In fact, however, the Australian constitution is far less unified than that of South Africa, is markedly more federal than that of Canada, and on the whole most resembles the constitution of the United States, upon which it was modelled.

The explanation of this more definitely federal form is to be found in the absence of the urgent need for union, in self-defence against foreign or native dangers, which had been present in the United States, Canada, and South Africa. That union came at all was partly attributable, as we shall see, to fear of the foreigner, but the threat was weaker and more distant and the motive for effective union therefore more feeble. A second factor that explains this distinctively federal development is the early grant of self-government. This meant that vested interests in separatism had established themselves firmly before the Australians began to consider the merits of combining.

As early as 1844 the Privy Council Committee for Trade and Plantations had reported that "the time has in our judgment arrived when Parliament may properly be recommended to institute in each of these colonies a legislature, in which the representatives of the people at large shall enjoy and exercise their constitutional authority." Following the recognition of responsible government in Canada, the Act of 1850 contemplated it for the then four colonies of Australia. In 1854, replying to representations from the colonists, Lord Grey announced Government approval of responsible government in New Zealand. Next year it

followed in New South Wales, Tasmania, Victoria, and Southern Australia. Separatism was undoubtedly strengthened by the policy, expressed by the Duke of Newcastle and followed in each colony, of creating the full apparatus of two-chamber legislatures in all cases in order to avoid "hasty" or radical measures.

But some movement towards federal union, at least in the minds of British statesmen, is clearly distinguishable even when responsible government is being separately granted. The chief motive for this at the beginning, as during the next fifty years, lay in the problems connected with trade relations and the raising of tariff barriers.

There were difficulties caused by the Imperial Preference Acts, which were not repealed until 1873. When, in 1842, New South Wales was prepared to give free trade to New Zealand and Tasmania, the Home Government disapproved. Differential treatment of the colonies both by England and by one another led Mr. Deas-Thomson, Colonial Secretary of New South Wales, to recognize publicly in 1846 the need for some measure of unified control. In the same year Sir C. Fitzroy suggested that there should be a Governor-General with power to consider trade legislation. In 1847 Lord Grey wrote that "considered as members of the same Empire those Colonies have many common interests, the regulation of which in some uniform manner and by some single authority may be essential to the welfare of them all. . . . Such interests may be more promptly, effectively, and satisfactorily decided by some authority within Australia itself than by the more remote, the less accessive, and, in truth, the less competent authority of Parliament."

It is worth noticing, in passing, that this first proposal of something in the nature of a federal control is represented as a delegation by Parliament of certain of its functions to a body nearer the centre of concern. In other words, it expresses a conception of British administrators which has

done much to further federal development. Authority is delegated by Parliament to local legislatures who are authorized to deal with matters that exclusively concern their locality. Matters of common concern are retained by Parliament within its own sphere of competence. But then it is seen that there are intermediate affairs which can be better dealt with by an intermediate authority than by Parliament or by the colonial government. Thus, out of the essentially federal relation between the Imperial Parliament and the self-governing local or colonial legislature, there emerges, with the growth of responsible government in the colonies, an inter-colonial authority distinct from Parliament. Being nearer the popular source of sovereignty than is the distant Imperial Parliament, which in any case represents only the British people and not the colonial people, this inter-colonial authority eventually brings back the federal relationship from its temporary triple expression to the double one with which we are more familiar. And the subordinate inter-colonial power becomes the federal government, independent of Westminster, but restricted by the separate colonies which it now binds together.

The exact nature which this inter-colonial authority should possess was referred by Lord Grey to the revived Committee on Trade and Plantations. This recommended a Governor-General with a General Assembly of Australia, to be composed of delegates elected by the colonial legislatures. It recommended this as a countervailing measure to its other proposal for separating the southern part of New South Wales from the jurisdiction of that colony. This area was constituted as a separate colony, Victoria, in 1850. At the same time a federal legislature was foreshadowed. It was to deal with tariffs, posts, roads, and railways, and shipping and harbours. A supreme court also was envisaged. Sir C. Fitzroy was appointed as Governor-General. The General Assembly, which he was to convene, was also to be em-

powered to raise money by its own enactments, the colonies acting as collectors.

Unfortunately, these proposals were opposed by the colonies. New South Wales resented the loss of the profitable areas of Victoria. Victoria itself erected a high tariff and was jealous of its new independence. South Australia held itself aloof from the colonies founded on convict transportation. There was a further obstacle to union in the numerical preponderance of New South Wales, which alone contained sixty per cent of the total population. It was feared by the other colonies, therefore, that they would be submerged under its control.

Although this first scheme came to nothing, the cause of federalism did not die. Already in 1867 New South Wales showed its advance in this direction by passing a federation Bill. In 1873 by the ending of Imperial Preference permission was tardily given to arrange free trade among the colonies. Victoria, however, was still opposed. The fiscal conference of ten years before had had little effect. While Victoria stood for heavy protection, New South Wales supported the cause of free trade. The only thing upon which it was possible to agree was that the Home Government should not interfere. Indeed, its earlier espousal of the cause of federal union had only served to postpone the adoption of this policy. Australians found it more difficult to advocate an idea which had already been tainted by imperial dictation.

Nevertheless, Gavan Duffy, an Irish emigrant to Victoria, took the lead in the federation movement there. He drafted a report for a committee of the Victorian Assembly, which considered the subject, and his arguments were to be quoted often and to play an important part in the battle for union. "Neighbouring states," he wrote, "inevitably become confederates or enemies. By becoming confederates so early in their career the Australian Colonies would, we believe, immensely economize their strength and resources. They

would substitute a common material interest for local and conflicting interests, and waste no more time in barren rivalry. They would enhance their material credit and obtain much earlier a power of undertaking works of serious cost and importance."

Distrust and rivalry, jealousy and conflict, marked the relations between the colonies, each intent on its own freedom and its own selfish interests. Duffy's efforts to paint the advantages of union were unavailing. Not until 1881 is any step taken in that direction.

Meanwhile the example of Canada had strengthened the cause. But it was much more directly affected by a quite new development nearer home. At last a foreign danger showed some signs of being born. The French had started deportations to New Caledonia in 1864. The Americans were active in Samoa, the Germans in New Guinea. Pressure was exerted by the colonies on the Imperial Government to annex Fiji in 1874 and the New Hebrides in 1878, but London suggested that federation was a necessary preliminary to further defensive action.

In 1880–1 an inter-colonial conference showed the growing interest in federation. Although, it was said, the time was not yet ripe for fully fledged union, a resolution was passed and a Bill drafted for the setting up of a federal council to deal with inter-colonial matters. It was argued too that this would lead to an increase in the support for federalism. In 1883, the year in which Germany annexed part of New Guinea, a conference at Sydney representing the six colonies as well as New Zealand and Fiji agreed upon the necessity for an Imperial Act creating a federal council with limited powers. Its most important task was to be to defend Australian interests in the Pacific. As a result the Australasian Federal Council Act was passed by Parliament in 1885 to apply only to those colonies which adopted it. As its function was to be purely legislative it was ridiculed

by one of the chief leaders of Australian federal union, Sir H. Parkes; and his state, New South Wales, as well as New Zealand, did not adopt the measure.

By 1890, however, the advocates of real federation, led by Sir H. Parkes, had become strong enough to secure that, at a conference called in that year, the policy should be accepted as an immediate practical programme. The occasion had been provided by a report on military defence, and was as much affected by the fear of foreign intrusion as the earlier step in 1883 had been. At a preliminary informal meeting Parkes argued that it would be useless to create anything less than a strong federal government worthy of representing Australian nationhood and endowed with the full powers of a state living its life among other states. It was insisted that there must be a federal executive with a revenue of its own and the control of defence. The advantages of federation could not be obtained without corresponding sacrifices on the part of the colonies. Finally, it was unanimously agreed to summon a National Australasian Convention.

This Convention met at Sydney in 1891. It consisted of forty-five delegates from the six Australian colonies and New Zealand, the latter having already indicated that it was not yet ready to join such a union as that contemplated. The discussions were radical in character, applying in several ways the principle of popular sovereignty. For amendment, for instance, the constitution was to be submitted to state conventions, popularly elected as determined by the federal Parliament. Despite the opposition of New South Wales and Victoria the principle of internal free trade and a uniform tariff for the union was accepted. The Convention continued its work for five weeks. The resulting Bill was then submitted to the colonial legislatures. Here, however, it was treated not as an agreed measure to be accepted or rejected as a whole, but was subjected to long discussion,

which, in the case of the New South Wales Legislature, was eventually postponed indefinitely.

It had by this time become clear that there was no hope of achieving a federal constitution without a direct appeal over the heads of the colonial governments to the people of Australia. But a popular education on the subject by political leaders was an essential preliminary if this was to be successful. This was therefore at once undertaken by the advocates of union. A private association was formed to promote federation, and grew rapidly. This body proposed that a national convention of directly elected representatives should be summoned after the necessary enabling Act had been passed in each colony. A conference of the colonial Prime Ministers came to the same conclusion in 1895.

Consequently a Bill was drafted to enable such a national convention to be summoned, and submitted to the colonial legislatures. After the convention had passed the constitution, this was to be subjected to popular referendum. The assemblies of New South Wales, Tasmania, Victoria, and South Australia adopted the enabling Act in the course of the next few months. Western Australia decided that its delegates should be chosen by its two legislative chambers sitting as one, and that the constitution should only be submitted to referendum if approved by Parliament. In Queensland the enabling Bill failed to pass.

Elections to the National Convention were held in March 1897 in the four colonies, and the Western Australian Legislature chose its delegates. Equal representation was accorded, and ten delegates sent for each colony. The Convention sat for a month in Adelaide, continued in Sydney five months later, and completed its work in Melbourne between January and March 1898. But the difficulties were not yet over. Although the constitution thus slowly and painstakingly prepared was accepted by the popular vote in Victoria, Tasmania, and South Australia, it did not receive

the required support in New South Wales, and Queensland still stood aloof. A further meeting of the Prime Ministers took place in January 1899 at which certain clauses in dispute were amended and safeguards of state boundaries added. Moreover, provision was made for constitutional amendment by a majority of the total popular vote together with a majority in a majority of the states. After these changes New South Wales came into line with the other three colonies, as also did Queensland. But Western Australia only accepted the constitution after it had been passed by the Imperial Parliament in 1900 and then only on condition that it was allowed for five years to impose its own tariff barriers against the other colonies.

Having thus laboriously achieved the support of the five colonies, the constitution was submitted to Westminster, and there accepted with practically no alteration, to become the Commonwealth of Australia Constitution Act, 1900, entering into operation on January 1st following.

The Australian Constitution was modelled on that of the United States. It represents a similar emphasis on the retention of state rights and is thus more strictly federal than the Canadian system. As in America, the Senate stands for the principle of state equality, and the High Court interprets the constitution. On the other hand, the British and not the American method of organizing the Executive was adopted. There is no acceptance of the notion of the separation of powers. On the contrary, it is explicitly laid down that ministers must be members of the Senate or the House of Representatives. The idea of a nominated Senate on the Canadian pattern would have been wholly out of keeping with the firmly democratic philosophy of the Australians. Instead, even the indirect election by the state legislatures proposed in 1891 was replaced by direct election on the same franchise and with the same eligibility as for the first chamber. To give expression to the interests of each state

as a whole its six senators were to be elected by its people as a single constituency.

To avoid the possibility of deadlock between the two Houses, which thus could each claim to speak for the people, two principles were adopted, the joint session and the composition of the House of Representatives in such a way that it would always have twice as many members as the Senate. To resolve a deadlock there must first be a dissolution of both Houses; if the deadlock then continues a joint session is held, and decision taken by majority vote. But in any case, the lower House alone has the right to initiate financial legislation. In distinction from the earlier draft the Commonwealth Parliament determines electoral law, although it may not impose different methods in different states.

The powers of the federal Parliament are many, but any not enumerated continue to belong to the states. The Commonwealth powers include control of trade, taxation, defence, currency, naturalization, immigration, posts, banking (other than state banks), railways (with the consent of the state concerned), labour (according to subsequent amendment), external affairs, invalid and old-age pensions, and insurance (other than state insurance).

The states may not raise forces; nor may they tax Commonwealth property. Their constitutions are guaranteed, and may only be altered as they themselves determine.

According, then, to the Australian plan the federal division of powers, while on the same principle as that of the United States of leaving the non-specified functions to the several states, nevertheless confers upon the federal authority a considerably wider range of authority. In particular, the provision of certain social services, such as pensions and insurance, is left to the central government. It is worth noticing also, in contrast with America, that there is no declaration of rights.

Australian constitutional development has not, of course,

stood still since the formation of the Commonwealth. On the one hand there has been the usual tendency to strengthen the central government at the expense of the states. There have not been wanting advocates, especially in recent years, of complete unification, who have even gone so far as to claim that federation was a mistake. Unification, they claim, would have been a far more satisfactory solution in a country which has no racial problem. These critics would appear, however, to be somewhat lacking in a proper historical sense. When all the difficulties of arriving even at the federal solution are recalled it is indeed difficult to see how a unitary state could ever have been formed. Certainly, to have proposed it when federation was being painfully born in the last decade of the nineteenth century would only have postponed union of any kind. They would appear, too, to overlook the geographic difficulties which have so greatly strengthened the other causes of separatism. Nevertheless, it is certainly clear that there has been in the past forty years a marked growth in the relative importance of the Commonwealth authorities. This has shown itself in the tendency of constitutional amendments, but especially in two developments. In the first place, since 1920 the High Court has reversed its previous interpretations which aimed at preventing indirect federal interference with the powers of the states over internal trade and production, and at preventing federal control over the terms of employment of state railway officials. Secondly, the war produced a necessary interference by the federal authority in the sphere of taxation hitherto left to the states. The weakness of the financial position of the states led them to make a financial agreement, which became a constitutional amendment in 1929, and which recognized—in return for substantial contributions—the Commonwealth control over state loans. When New South Wales defaulted in 1932, the Commonwealth Government, acting under its newly recognized powers, passed

legislation sequestering the state's revenues, and on resistance by the state Prime Minister he was dismissed.

At the same time, it must be remembered that insistence on state rights has, even since the union, marked Australian history. Repeated efforts to obtain more power over trade and monopolies have failed at referenda in 1911, 1913, 1919, and 1926. Finally, Western Australia has shown the continuing strength of separatism within its boundaries by its proposal to secede in 1935, a proposal which has not been accepted.

9. GERMANY

The collection of several hundreds of separate sovereignties in central Europe survived from the Middle Ages into the nineteenth century. These principalities, duchies, free cities, and the rest existed under the formal overlordship of the Emperor, but they could hardly claim to be a confederation, except of the very loosest kind. Their selfish particularism showed its own strength, and the corresponding weakness of the combination when Napoleon's armies advanced eastwards. Some, like Saxony, joined him; others, like Prussia, hoped to buy him off with a policy of appeasement. But all went down before him.

Perhaps, in the long run, it may be claimed that the French General did them some service. He created the Confederation of the Rhine, the kingdom of Westphalia, and thus gave to a portion of them some training in unity. Even more, the reaction to the French control combined with the democratic movement to foster a spirit of German nationalism. This was in time to provide a unifying force of some importance.

The Germanic Confederation of 1815 was formed by treaty and given shape in the Federal Act of the Congress of the Powers on June 8th, 1815. It was as far towards

union as the states were then ready to go. The intention was that it should be a permanent combination for common defence. Prussia and Austria were members in respect of the territories which had hitherto formed a part of the old Empire: the King of England for Hanover, the King of Denmark for Holstein, and the King of Holland for Luxemburg and Limburg. At first consisting of forty-one sovereign areas, it came by absorption to comprise thirty-three; but this was already an immense reduction from the three hundred which had belonged to the Holy Roman Empire at its dissolution by Napoleon.

The Federal Diet, which was the organic expression of the Confederation, consisted of plenipotentiaries. It was not a law-making body; its ordinances were valid only when ratified by the member states. Normally, that is to say, it must act unanimously, but for questions of peace and war it could act by two-thirds majority. Inequality between the states was in some degree recognized, the biggest states—such as Prussia, Austria, and Saxony—having four voting delegates, others having two and three each, and the smallest having one. The Diet, with its total of seventy members, acted mostly through a Council of seventeen, eleven of whom represented the chief states, the rest being divided in six curiae with one representative for each.

While Prussia wanted to organize an effective federal army on the basis of one per cent of the population, Austria was—perhaps shortsightedly—opposed to this; and the common army therefore was to be composed of contingents raised independently by each member state. No commander-in-chief was to be appointed until war actually occurred; the contingents, when supplied, lacked uniformity, training, and cohesion; often they were not supplied at all. The organizing of defence consequently devolved upon Prussia, which thus secured the first fundamental of its hegemony.

Nor was there any federal power of taxation. As in the old

Empire, expenditure was to be met by contributions proportional to population.

The main purpose of the confederation was not unity but stability. The sovereigns, whose voice alone was heard at the Congress of Vienna, were concerned above all things to stem the revolutionary tide. The Carlsbad decrees were soon to show their common policy of autocratic suppression. If they accepted the principle of combination it was not to answer the demands of a people who had been promised, and thought they had been fighting for, German unity; it was to give themselves the added strength of mutual support against popular insurrection which, if it was successful in one area, might spread to others. The sovereigns did not forgo any of their independence. They were merely given the added security of a confederation ready to maintain them in authority by intervention if necessary. Any popular movements for unity were still much too weak to prevent betrayal of their hopes by princes and leaders who with one accord failed to rise to their opportunity.

But the Congress had not killed liberalism or the national consciousness that went with it. When revolution spread across Europe in 1848 the spirit of both was clearly visible. It spread, significantly enough, from the territories bordering on France and Switzerland. The honour of proposing a national assembly belongs to the Liberal party of Baden which put it forward in the Lower House of that state. Unfortunately, division immediately showed itself between the republican and constitutional sections of the liberating movement, and it thus showed a certain weakness from the start. The moderates, however, were stronger and their policy of a constitutional Empire with an hereditary head was to dominate the discussions.

These were inaugurated by the South German democrats who summoned a preliminary conference to meet at Heidelberg. A general invitation was issued to members of the

legislative bodies of the states to consider federal reform. Meanwhile, it is a striking fact that the princes offered no resistance. The Liberal leaders revealed the extent of their self-confidence when they appointed a committee to organize the summons of a national assembly, and empowered it to confer—but only if it thought this necessary—with the Federal Diet. The discredited Diet was almost subservient. It was afraid to refuse and anxious to re-establish itself in the public favour, but by its co-operation it achieved a certain success, for the delegates to the assembly were appointed as the state governments determined.

This German National Assembly which met at Frankfort on May 18th included among its 550 members most of the political and intellectual leaders of Germany. Its President, von Gagern, demonstrated the tone of its discussions. "We are here," he said, "to create a constitution for Germany, for the entire Empire, and our mandate and authority for this work lie in the sovereignty of the nation. Germany wishes to be one."

Many weeks were spent in the drawing up of a long declaration of rights, while urgent practical problems remained unsolved. Among the chief of these was the rival claim of Prussia and Austria to provide leadership in the future union. It was decided to exclude Hungary, and therefore, it was thought, Austria would be unwilling to accept the chief position. On the other hand, there was strong hostility to a Prussian leadership. The King of Württemberg had announced that, while he would accept a Hapsburg, he would never subordinate himself to a Hohenzollern. Saxony and other states sympathized. Prussia was regarded by some as not a "pure German" but an alien element. The more advanced democrats were opposed to giving the lead to Prussia as the home of reaction. Actually there was no need for fear because the Prussian King, Frederick-William IV, did not wish to exclude Austria, and eventually refused the Crown.

The constitution, as it was eventually drawn up, aimed at establishing a parliamentary system of hereditary Emperor, an imperial senate of princes representing the federal element, and a representative assembly of one member for every 100,000 citizens. There was to be complete ministerial responsibility, and the lower chamber alone was to deal with finance.

But by the time the work was done and this relatively advanced constitution had been drafted, the opportunity had already passed away. The revolutionary fervour had died down. The actual rulers were no longer afraid, and they could afford to disregard the temporary federal chief executive, Archduke John of Austria, who had been welcomed at his inauguration even by the Federal Diet itself. The Assembly had shown its inability to cope with the situation, albeit a difficult enough one, had dissipated its energies in abstract discussions and in a concern with all kinds of questions of no immediate urgency for Germany, such as the situation in Poland, Italy, and between Denmark and Schleswig-Holstein then at war. Moreover, the popular movement had been undeservedly discredited by the assassination of Prince Lichnowsky which took place at Frankfort during the deliberations.

What the Liberal movement was unable to accomplish through a German representative assembly, was eventually achieved by "blood and iron." Federal union had always been confronted by that usually insuperable obstacle, the existence of one or two vastly preponderant member-states. Prussia was to take advantage of its numerical preponderance and its military superiority to create a federal Reich under its own hegemony. The work of Bismarck really culminated, after the successful exclusion of Austria by the war of 1866, with the creation of the North German Confederation under the presidency of the King of Prussia. The new popular Reichstag had no effective powers. The Chancellor was

responsible to the King alone as the federal chief. The most important body was the Bundesrat, in which Prussia had seventeen votes, while fourteen were enough to block any action. Prussia, with its strong army and efficient civil service, exercised the real control. The changes which followed on the defeat of France, including the proclamation at Versailles of the King of Prussia as Emperor of Germany, were of only superficial importance. The only important fact was that Prussia had now stabilized the German confederation under her own dominance.

Not until the downfall through military defeat of a system created by military victory was there a return to the ideals of a union based on Liberal principles. When the constitution of Weimar was drafted in 1919 a republican Germany from which the princes had now disappeared looked back to the abortive attempt of 1848 and submitted itself to the influence of the Frankfort Assembly.

The Weimar constitution, however, showed the extent to which an evolution had taken place under the Empire towards a unitary Germany. Powers were divided between the central government and the states, but the former was greatly strengthened. Indeed, so much were the functions of the states restricted that some have been ready to contend that the republic was not federal at all. But it did contain eighteen separate states each with its own government. These had little autonomy at the outset, and less as the strong urge to administrative centralization revealed itself. The railways, for instance, were soon unified under the control of the central government; and the financial powers of the latter were so great that the states were in the main dependent upon it.

The President and Reichstag both represented the people as a whole. Only the Reichsrat, or federal council, stood as an expression of the separate entity of the several states, and this was not, like the American Senate, a chamber of equal

powers with the representative body. Nor did it represent the states on the basis of equality between them. The only step in that direction was the provision that no state should have more than two-fifths of its total membership. It consisted of ministers from the state governments in number roughly proportional to its population. Still more important was the fact that it could not legislate. It could only veto legislation until this had been passed by a two-thirds majority of the Reichstag and by the President, or by referendum.

There was also an attempt, which proved unsuccessful, to establish a kind of economic federalism. Vocational representative economic councils were set up finding their culmination in a national economic council, to which all laws of economic character were to be submitted. This failed for several reasons, but chiefly because its approval was not required for a law to pass.

II

The Form of Federation

The creation of a supreme law-making body reveals the obstacles to federation in their fullest strength. The greatest contribution to the solving of this problem was furnished by America in 1787, in the form of its two-chamber system.

For the most part, early types of confederation have been rendered impotent by the requirement that decisions shall only be taken by unanimous agreement. This may mean no sacrifice of independence on the part of the several states at all. But even when that difficulty has been overcome, and they have shown themselves willing to abide by some kind of majority vote, yet another obstacle to effective organization is revealed.

Independent states, however much they may vary in the size of their population or in their real strength, are equal in their sovereignty. Although they may be willing to forgo some of their rights of self-determination, they are apt to claim that exactly equal sacrifice in favour of the common interest should be made by all. They seek a safeguard of their separate entity in equal representation. But, if granted, this principle of equality means that voting becomes devoid of reality, for it does not correspond to actual forces. Decision either cannot be taken by voting at all, or if taken an important member-state—like Massachusetts in the union of 1643—may refuse to observe it. The principle of equality between states of unequal population has the further disadvantage that it necessarily means inequality between the political rights of citizens.

The American solution—a Senate to express state equality and a House of Representatives to stand for the principle of

equal rights among citizens—has proved its value by the almost universal imitation of later federations. Switzerland adopted it in 1848, establishing a Council of States with two representatives of each canton and one of each half-canton. So did Australia with six, and Argentina with two, senators for each state. South Africa applied it by giving eight senators to each state, although their number was supplemented by eight further senators to be appointed by the Governor-General, of whom half were to be selected "on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races." If Canada resorted to appointment and not election for the composition of its second chamber, it was divided into three areas, corresponding with the provincial boundaries, from each of which an equal number of senators was to be selected, and they were to be both resident and property owners in the province for which they were appointed. On the other hand, the Spanish Republic did not provide for a second chamber at all, although it did place a representative of each region on its supreme court. And the German Weimar constitution, while it set up a federal second chamber, did not base it upon equality—although it did create a maximum of two-fifths for any one state—and did not give it equivalent legislative powers.

The method of electing such senates has shown some variety. In Switzerland the method was left to each canton to determine for itself. South Africa empowered its Parliament to alter the method after the lapse of ten years. But in most federations the constitution itself provides for the election of senators by the legislative body in each state in joint session. That was true of the United States, Argentina, and South Africa. A later tendency was shown by Australia which provided for direct election by the people, and the United States followed suit by constitutional amendment in

1913. The terms of office of senators are generally longer than in the lower chamber, and the senate is usually renewed in portions. The term varies from election for one year in some Swiss cantons to appointment for life in Canada, but the period of six years in America and Australia, nine in the Argentine and ten in South Africa suggests the average.

It is worth remarking, too, that in Switzerland, while the cantonal delegates in the Council of States are elected and paid by the cantons, it is explicitly laid down in the constitution that they may not receive instructions from their electors.

The powers of the two chambers are generally the same, but this is subject to certain modifications. Throughout the British Commonwealth there is the general practice that the popular body alone may initiate financial measures, a principle carried on from the British Constitution. Outside the United States, where the Senate is on the whole more powerful than the House, avoidance of the danger of deadlock so often revealed there has been sought in the joint session or the referendum, as in Australia and Switzerland. But there is also a tendency shown in custom rather than in law for the popular assembly, with its greater claim to true representativeness, to become the real centre of authority. This is naturally more marked where the Senate is an appointed body as in Canada, but it is noticeable even where, as in Switzerland, the Council of States is elected. With the growth of a sense of national unity the change of emphasis from the delegates of the states to the popular representatives is hardly a surprising development, and it has in fact taken place. It is perhaps partly attributable to an appreciation of this fact that the Weimar constitution gave a subordinate position to the Reichsrat. Only in the United States, where the Senate enjoys a special position owing to the constitutional requirement that it shall ratify treaties by two-thirds vote and certain appointments, and where Congress is over-

shadowed by the exceptionally strong position of the President, has the House of Representatives failed to increase the relative importance of its position to the same extent.

Little needs to be said about the first chamber in federal constitutions. Generally the principle of proportionality to population is laid down in the constitution, and the exact method of applying it is left to the legislature to determine. In the initial stage, it is true, the definition of electoral qualifications and the control of elections is sometimes left, as it was in the United States and in Australia, to the state authorities; but eventually it is regulated nationally.

Finally, there is the further provision to be found in some cases for popular participation in the law-making process on federal matters. This is a provision used also for constitutional amendment. It has been used in Switzerland, Australia, and the German Republic.

2. EXECUTIVE

The absence of an effective executive authority was clearly one of the principal weaknesses of the American confederacy. To remedy this deficiency was one reason for the summons of the Philadelphia Convention. If the executive is to have the proper function of leadership it must be strong, and if strong it may be dangerous. Suspicion therefore is apt to attend its creation; and confederations show themselves unwilling either to create it or, if created, to give it sufficient power. This was markedly true of the Swiss leagues before 1848 and of the American unions before 1787.

Federal executives are of three types: the president, the council, and the cabinet. The last can be disposed of briefly, for it does not differ from the government in the parliamentary systems with which England, France, and most of the democracies are familiar. It consists of a group of

ministers selected by the Prime Minister, who is himself chosen by the formal head of the state in order to represent the strongest party or coalition in the legislature. These ministers are members of that body and are responsible to it; and in fact they are its leaders. Where a formal head of the state is already in existence, as is the case in the federal unions formed within the British Empire, it has been perfectly easy for this form of executive to develop. All that has been necessary has been to apply the working principles of the British Constitution, a Governor taking the place of the Sovereign. As we have seen, these federal unions have only been formed in practice after this particular type of responsible governments had already been in operation in each of the separate units or colonies incorporated for some years. Thus it merely meant the application in the sphere of the federal government of principles and practices with which everyone was familiar in the states or provinces. There were no special complications associated with the creation of such an executive. Once the various units had shown through their spontaneous demand for union that a sufficiently strong sense of unity existed, it was possible to set up a cabinet system on these lines.

The American problem, however, was much more difficult. There was no ready-made chief of state to fall back upon; and yet the need for some such person was felt. Had not all the colonists been accustomed to the existence of such a person, in the shape of the King of England, until but a few years before? Granted that there must be a single person as head of the state, there followed the question of the method of electing him and of his powers.

For electing the President it would have been possible to rely on Congress, on the state legislatures, or on the people. A compromise solution was adopted. To have given the power to the people directly would have been too democratic for the American constitution-makers; it would have savoured

too much of popular government which they feared might degenerate into demagogy and mob-rule. The people must be defended, it was believed, against a dictatorship by a majority of themselves. Election by Congress might suffer from similar defects; but in any case it would be liable to make the President the instrument of Congress; and this was incompatible with the notion of the separation and balance of powers. Finally, to make the President the creature of the state legislatures might foster a spirit of separatism and unduly weaken the federal authority in favour of the states. It might be said that a compromise had to be found between the two principles embodied in the two Houses of Congress. This was found in a complicated provision whereby the people in each state were to choose, in such manner as the legislature of the state determined, a number of presidential electors equal to that of the Senators and Representatives for that state. These were to choose the President. If no clear majority emerged for any candidate, then the Federal House of Representatives should choose from the three highest candidates. But it is significant of the emphasis intended to be laid on the separateness and equality of the several states that in this last eventuality the House was to vote state by state, the Representatives of each state having only one vote between them.

In actual practice all this complicated procedure lost much of its importance. As federal unity became more marked and a national spirit grew, the electors became a fifth wheel to the coach. They were pledged to support a candidate, whose party following covered the whole union, without exercising any independent judgment. The presidential election was fought on a national, and not on a state, arena.

This presidential form of federal executive has not been exported from the American continent with any success. But it is to be found in the Argentine; and in Europe popular election of the President was adopted in a direct form in the

German Republic, in an indirect form in the Republic of Spain.

The third type of federal executive is that which has been adopted by Switzerland. The Swiss Federal Council is an executive of seven members. It is elected immediately after a general election by the Swiss Federal Assembly, the joint meeting of both chambers of the federal legislature. Not only do its members remain in office for the four years term, but they are habitually re-elected until they resign. Their chairman, who changes each year, is the only formal head of the state possessed by Switzerland.

The Swiss Federal Council is interesting for many reasons. The makers of the Swiss constitution immediately rejected any idea of a single president on the American model; such a conception they regarded as wholly out of keeping with their democratic traditions. The Council is in fact an embodiment in the federal sphere of a type of governmental institution long familiar in the cantons. But there are two characteristics of this system which make it remarkable. In the first place, the practice has been adopted of so constituting this Council that it always contains one representative each from the three chief cantons. It is also made to conform in a general way with the different linguistic divisions of the country. As has often been pointed out, it bears several resemblances to the Council of the League of Nations, which also has its states with permanent seats, and a system of election to the others by the Assembly. The second remarkable feature of the Federal Council is its continuity. This has only been possible because of peculiarities in the Swiss social and political structure which distinguish it from most modern states. There is a striking class uniformity. It has even been claimed that Switzerland lacks both upper class and proletariat. But certainly it has been without strong party divisions, or at least without any party strong enough to challenge the dominant bourgeoisie. Per-

haps, too, the steady determination to follow in foreign relations a strict policy of neutrality, most carefully defined to avoid the risk of conflict with the neighbouring countries who represent the three linguistic traditions of the Confederation, has helped to make this continuity possible.

Executive powers in the Dominion federations are the same as the prerogatives of the Crown in England, with a few unimportant exceptions. They include the dissolution of Parliament. But it is only with the development of dominion status into complete independence that they have become concentrated in the Dominion Government. Previously they were always subject to supervision by the Imperial Government and to its arbitration in disputes; moreover, relations with foreign governments were conducted through London. This accretion of authority by a gradual process, which was made possible by the prior existence of a supreme power in London, clearly eased the course of federal executive development in the Dominions. Although these executive powers are immense, they are subject to an effectively organized supervision by Parliament and to its ultimate control.

There is a fundamental distinction between the British and the Swiss tradition on the one hand and the American on the other. The former stands for legislative supremacy; the idea of an executive veto is foreign to it; the executive is regarded as the instrument and servant of the law-making body, not as its equal; the idea that a check upon the will of Parliament, except perhaps that constituted by a reference back to the people, is absent from British politics at least since 1832, and from Swiss politics at least since 1848. If the British Cabinet does exercise a control over Parliament, it is by virtue of the fact that it is the chief organ of Parliament itself. But the American President is a co-ordinate authority with Congress. He can prevent its Bills from coming into effect unless reaffirmed by a two-thirds vote in both

Houses. He cannot be removed by Congress except for crime, nor can he dissolve Congress to appeal to the people. Since he is a co-ordinate authority with Congress, deadlock between them is possible, and indeed by no means infrequent. Except for his treaty-making power, which requires a ratification by two-thirds of the Senate, and except for the fact that a declaration of war must be made by Congress, his constitutional executive authority is exercised without Congressional control. He is Commander-in-Chief of the army and navy, the officers of whom are commissioned by him. He appoints all federal officials, save that the Senate must approve his choice of ambassadors and judges of the Supreme Court. He must see to the observance of the law, and if called upon by a state or if the defence of federal interests requires it he may intervene in a state with troops.

If there is a veto in the Swiss federal state, it is exercised not by the executive but by popular referendum after popular petition. The authority for ratifying treaties and declaring war is the Federal Assembly. Here, as in the power to intervene in the cantons for the defence of the constitution, the principle is similar to that adopted in the United States. The provisions for military control, however, are slightly different. Although the Federal Council is responsible for organizing the federal army, the Commander-in-Chief is appointed directly by the Federal Assembly, and then only in war or on the threat of war.

3. JUDICIAL INTERPRETATION

In a federal system it is necessary to establish a federal court with jurisdiction superior to that of the state courts, if only because the latter might not be trusted to try with impartiality cases involving the federal authorities. But also it is clearly desirable that there should be a means of unifying

judicial interpretations so that there shall be one body of law for the union, at least on matters coming within the sphere of federal jurisdiction. But, although in America the Supreme Court has been given the power to invalidate Acts of Congress, it does not in the least follow that the granting of this predominant power is an inevitable consequence of federal union. Indeed, the most distinctive feature of the American application of federalism is furnished by the key position of the Supreme Court. In no other federation can a parallel be found. Nor would it seem that this judicial supremacy had been fully intended by the makers of the American constitution themselves, for they merely laid down that it should have power to deal with "all cases . . . arising under this Constitution." That this cannot be said unquestionably to imply a right to declare a law of the supreme law-making body invalid is suggested by the Swiss constitution, for this allows the federal court to deal with claims that government authorities have violated the constitution, but does not permit invalidation of federal statutes. Danger, difficulty, and an often highly unprogressive lack of adaptability have been the consequence of this judicial predominance in the United States, which can only be overcome by constitutional amendment. It has sometimes been argued from this experience that a federal system must necessarily suffer from these defects. The Swiss practice is a sufficient answer to the contrary.

What are the functions which a federal court must be established to perform? First, it must deal with conflicts among the federal and state authorities, or which involve one of these. Secondly, it must decide cases involving claims that constitutional rights have been violated. Thirdly, cases of high treason or that raise matters of international law come naturally within its jurisdiction.

But the whole question of the desirable powers of a federal supreme court is closely connected with that of constitutional

amendment. If the latter is an easy process, far less difficulty and danger are likely to attend the giving of such far-reaching powers to a supreme court as are given in America. An invalidation of Congressional Acts is rendered doubly important if such a decision cannot be reversed without resorting to a slow and elaborate procedure fraught with political conflicts, as is the case in the United States, where such a small minority can prevent change.

In federal as in other constitutions the legislature is generally given the power to constitute and organize a judiciary. This is surely significant of the proper relation between these two organs of the state. Provision is usually made, it is true, to prevent undue influence being exercised upon judges; their salaries, although determined in the first instance by Parliament, may not be reduced; they may not be removed save for moral delinquency. But they are appointed, and their courts are regulated, by the legislative or executive authorities, or by a combination of the two. If general principles are laid down to determine their powers, the application of them is left to Parliament.

In the United States, appointment to the Supreme Court is by the President, with the approval of the Senate. There are nine judges; but this number could be altered at any time, even though in fact it has not been, by Act of Congress.

The Swiss Federal Assembly elects the members of the federal tribunal. The constitution of 1848 set up a court elected for three years. Its members, who were often not lawyers but deputies on the National Council, had few and unimportant powers. They could not deal with conflicts of jurisdiction between the Confederation and the cantons, or between cantons, for decision on these was reserved to the Federal Assembly itself. And the tribunal could only settle civil conflicts between these authorities if they were submitted to it by the Federal Council or the Federal Assembly. It could not adjudicate on claims that the constitution had

been violated unless the Federal Assembly referred these to it. This arrangement, however, was found unsatisfactory and was profoundly changed at the general revision of 1874. The court was strengthened, given a permanent seat at Lausanne, and its term lengthened to six years. No member of the Federal Assembly could any longer be elected to it, and legal qualifications were made necessary. Its jurisdiction was enlarged to cover all three types of case mentioned above, but it was expressly laid down that it should not be able to declare an Act of the Federal Assembly invalid. The court was also given criminal jurisdiction, for which cases it was to act with a jury, in relation to high treason, violence that involved the use of federal troops, and penal offences against international law. It must uphold the federal constitution and statutes over cantonal constitutions and laws. Originally consisting like the American court of nine judges, it has been increased to twenty-four, who sit in divisions; but there are none of the subordinate provincial branches of this court which exist in America. Elections to this body, as appointments to the American Supreme Court, are influenced by political—and by regional—considerations.

The corresponding courts in the federal systems of the British Commonwealth differ from the above in certain important respects. Again, the existence of the Imperial Government, and in particular of the Judicial Committee of the Privy Council, is mainly responsible for the difference. Although the possibility of appeal to this has long been a bone of contention between the Dominions and the Home Government, it now has small importance. These federal supreme courts are appointed by the executive, and their members are removable only on address by both Houses of Parliament. But the subordination of their sphere of activity to Parliamentary control is ensured by the fact that, in Canada and South Africa at least, Parliament is supreme in its law-making capacity. In Australia the only restriction is

that created by the special provisions for constitutional amendment, which is described below.

Special recognition of the importance of political considerations in the choice of such powerful officials as the judges of the chief court was shown in the establishment of the Court of Constitutional Guarantees of the Spanish Republic. This was composed of a president and two deputies elected by the Cortes, the President of the Fiscal Court, one judge elected by each autonomous region, two elected by the barristers, and four by the teachers of law in the universities of Spain. Thus the lesson learned in America that the political philosophy even of a judge affects the nature of his decisions was shown to have had its effect in Spain; and an attempt was made to base the composition of the Court on a broad and representative foundation. Reference was also made to the Constitutional High Court of federal Austria, whose members were elected by Parliament for life.

4. CONSTITUTIONAL AMENDMENT

Here again the difficulties and complexities of federal development were fewer in the British Commonwealth than outside it. Since the original federal constitution, although the result of agreement between the colonies was given legal shape and validity by an Act of the Imperial Parliament, it could always be altered in the same way.

Now that the Statute of Westminster recognizes full self-determination in the Dominions, their Parliaments have the power of constitutional amendment in fact, although there is still some provision for the Imperial Parliament to act as an instrumentality of the Dominion Legislature in this respect. This applies to Canada in particular. The South African Parliament was specifically empowered to alter the constitution, with the proviso that certain matters relating

to the composition of the electorate, and the maintenance of the two official languages, could only be changed by two-thirds majority of both Houses in joint session. There were also certain provisions which could not be altered for ten years.

Amendment of the Australian Commonwealth constitution is effected by popular referendum, provided that the proposed change receives a majority in a majority of states, as well as a majority on the total vote. The amendment must first pass both Houses of the Commonwealth Parliament, or one of them twice with an interval of three months. But "no alteration diminishing the proportionate representation of any State in either House of the Parliament" or affecting state boundaries "shall become law unless the majority of the electors voting in that State approve the proposed law."

The method of constitutional change in Switzerland is rather more complicated than in Australia although similar, but the Swiss have shown themselves more ready to make use of it than have the Australians. It requires a majority of both Houses together with a majority of voters and of cantons.

But the earliest federal constitution now existing, that of the United States, erects the greatest obstacles to constitutional change. A majority of two-thirds of each House of Congress must be followed by a majority in the legislatures —or in conventions if Congress so decides—of three-quarters of the states. An alternative method was also provided. This was a majority in two-thirds of the state legislatures in favour of the summoning of a national convention, followed by the submission of that convention's proposals to the states, the amendment coming into effect on ratification by three-quarters of them. Again, there was a time-limit (i.e. not before 1808) to amendment of a clause allowing freedom to the states to permit "migration or importation" of persons into their territory. Under the same

time-limit came the clause, later interpreted to invalidate the levying of a federal income tax, and amended in 1913, this clause reading as follows: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." And finally, "no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Argentina laid it down that the necessity for amendment "shall be declared by Congress, by a vote of at least two-thirds of its members; but the amendment itself shall not be made except by a convention called for that purpose."

When the Spanish Republic created the autonomous region of Catalonia it included in the Catalan Statute a clause restricting changes. These required approval by Catalonia and by a two-thirds vote of the Cortes.

It is generally accepted in federal constitutions that, in return for guarantee by the federal authorities, the state constitutions must be in some measure subject to a federal veto upon amendments of them. Thus "the United States shall guarantee to every State in this Union a Republican form of government." Changes in the American state constitutions could be invalidated by judicial procedure if they did not conform to the principles of republican representative government. Similarly the Swiss Federal Assembly or Federal Tribunal can invalidate a cantonal constitution on the same ground. Again, in Australia changes in the state constitutions must be made in accordance with the methods laid down in them, and they may not conflict with the federal constitution.

Provision for the admission of new states to the federal union had necessarily to be made in the United States and in Australia as well as in Canada. In the first the power of admission was given simply to Congress. The Australian Parliament "may admit to the Commonwealth or establish new States" and impose terms and conditions on entry. In

the case of Canada the Act provided that the Queen in Council could admit an additional colony on address by its own legislature coupled with an address by the Canadian Parliament. In all three unions this power of admitting new members has been extensively used.

5. THE ALLOCATION OF POWERS

It may be laid down as a general principle of federal union that the competence of the central government is limited to the exercise of specified powers. All powers not specified are retained by the several states. Canada and South Africa, it is true, are exceptions to this rule, but in both cases it must be remembered that the existence of a common government at Westminster with legally supreme powers raised the problem of allocation in rather a special form. But even in the case of the other federal dominion, Australia, we are back at an example that only serves to fortify this general principle.

As to the nature of the powers allocated we can draw certain conclusions from a comparison between different areas and different stages of federal development. We are entitled to say at once that a federal authority cannot be effective, and indeed cannot hope to survive, unless it has direct control over military force. If the federation is to be a real unit in international relations, it must have under its immediate authority, not only the making and conduct of foreign policy, but the force necessary to support it. This is the clear lesson of federal evolution learned from a number of painful experiences. Indeed, the chief contrast between a confederation and a federal state is to be found in this factor. Its truth is shown, as we have seen, by the history of the early Swiss leagues, of the Germanic Confederation, and of the American Confederation. Only when the units which

composed these groups were willing to confer this particular function upon the common authority were they successful in maintaining an effective union. Such a power is essential to defend the union from foreign aggression, but it is also required to maintain order within the union, to secure the observance of the federal constitution, and to guarantee obedience to the state authorities. For the right to intervene in order to maintain a lawfully constituted state government must also belong to the federal union; without it different types of political system, inimical to one another, might prevail in different parts of the federation, and such differences are incompatible with unity, as the Swiss experience alone is enough to prove. The corollary of such a right to intervention is the possession of the force necessary for its accomplishment. Confederate experience demonstrates that it is not sufficient for such forces to be supplied by the state governments to the federal authority when occasion requires. The government which raises the troops, equips and organizes them, inevitably enjoys the first claim to their loyalty; if it is the state, then this will be free when the occasion arises to hand over or to withhold control; reliance cannot be placed upon its willingness to fulfil its obligations, however solemn they may be, for a temporary or sectional interest may seem to dictate their breach; moreover, the possession by the state of its own contingents, officered under its own command, is a positive incitement to disobedience and civil war. We may conclude, then, that the federal government must have the power to raise, equip, and commission its own troops, air force, and naval defence. This power must belong to it exclusively and not to the states, and it must carry with it the control of armaments.

Thus, under the American constitution the President was made commander-in-chief, and Congress was expressly empowered "to raise and support armies" and "to provide and maintain a navy." Further, "no State shall, without the

consent of Congress . . . keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay." The federal authority was also given control of forts, arsenals, and dockyards. While the states were to maintain militia for police purposes, the Congress was given the supreme power even over these. It was "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

In Switzerland federal control was tightened rather more gradually. A loose federal supervision was provided for under the constitution of 1848, but the army was composed mainly of cantonal contingents, a federal commander-in-chief being elected in emergency by the Federal Assembly. Successive stages in the evolution of the present complete federalization took place in 1874, 1907, and 1935. The Helvetic leagues had possessed no federal army at all. The dangers of the lack of uniformity in the Swiss army were especially revealed by the Franco-Prussian war of 1870, which was the immediate cause of the changes of 1874. The Federal Government is empowered to take control in a canton when disorder threatens, and this power has been used several times. The functions of the cantons are now restricted to keeping lists of men liable for military service, equipping them in part, and to disposing of troops on their territory when the Federal Government does not do so.

The existence before and after federation of an imperial defence force has diminished the difficulty of this problem

in the British federal dominions, for it has meant that the several colonies combining have been accustomed to a common defence force. The general principle, however, is maintained by them. Defence is under federal, and police under state, control, the latter being subordinated to the former at the will of the former.

German development has been so greatly influenced by the military predominance of Prussia as to afford little illumination. But it is worth noticing that the failure of the early confederation which made Prussian control possible was mainly due to the unwillingness of the many states to pool their military resources in an effective common army. It was the absence of this that eased the path for Prussian hegemony.

The second general power necessary to an efficient federal government is that of the direct control of tax collection for its own purposes. An army cannot be run unless it can be paid; nor can a civil service. Exactly the same general considerations are raised, in fact, by the financial as by the military problem, and the same conclusions are valid. When the common authority has to rely on the willingness of the states to hand over the money they have collected, even though it be under federal law, on its behalf, it is in reality at their mercy. That was certainly suggested by the experience of the first American confederation. We must remember, however, in some modification of this that a federal power to impose tariffs and federal control of customs-houses may supply an important and possibly even an adequate source of revenue. This may be supplemented, too, by federal undertakings for profit. The post office, inter-state communications, the Swiss alcohol monopoly and national railway, civil aviation, hydro-electric works, are all actual or possible examples. There are many ways of imposing taxes. What is important from our present point of view is not that the taxation shall be direct, but that its collection shall be.

An income tax may be the most equitable form, but a customs duty, a stamp tax or a motor licence tax may be easier for the federal authority to levy.

Since 1848 the Swiss federal authorities have possessed the power to impose customs duties. The revenue from this source for long sufficed to cover federal expenditure. Today it is still the main item in the budget. But it was originally expected that the federal government would be dependent upon the cantons to supplement its revenues, and provision to this effect was inserted in the constitution, although it has never been used. Only the breakdown of international trade during the war of 1914–1918 weakened the federal position to such an extent that it became necessary for it to seek power to levy direct taxation. Hitherto the cantons alone had imposed an income tax; and even so they had to come to the federal exchequer for assistance, a fact which naturally served to increase its influence. By 1913 federal grants absorbed a quarter of federal revenues. The centralizing importance of this tendency, the diminution of cantonal independence which it involves, is highly significant of Swiss federal development.

The United States Congress was given power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." While it could regulate commerce it could not levy export duties. Here again the federal sources of revenue proved satisfactory for a long time. Not until late in the nineteenth century is an attempt made to find a new source of revenue in an income tax. Invalidated by the Supreme Court, the power was granted in 1913 by constitutional amendment.

The taxing power granted in the British dominions has been even more specific and complete. Thus the British North America Act includes among the powers of Parliament

that of "raising of money by any mode or system of Taxation." A similar provision appears in Australia, but with the added proviso "but so as not to discriminate between States and parts of States." The South African constitution includes complete taxing authority without restriction.

Certain other powers of obviously general convenience are habitually conferred upon the federal authority. Such are the issue of currency, the regulation of weights and measures, census and statistics, the granting of naturalization, copyright.

The power to impose a tariff against foreign imports and to ensure equal freedom of inter-state trade has generally been conferred upon the federal legislature. This was so in America and Switzerland. It has often been asserted that complete internal free trade is an essential of federal union. Undoubtedly it is to the long-run advantage of the federation. Clearly also it is more in keeping with a spirit of unity. There can be no question that a continuing power attached to the states to raise barriers to importation from other states members of the union would be likely to cause some measure of friction between them. But, on the other hand, it must be remembered that many unitary states have not found the existence of barriers to trade, even when imposed by quite small local authorities, an impediment to the continuance of their national unity. It would seem to follow that such a federal power, while highly desirable on both political and economic grounds, is not an absolute essential of federation. In Australia this tariff problem was among the most difficult obstacles to federation. It was only finally solved after years of discussion, in which some of the states clung tenaciously to their right to levy duties, by several complicated compromises. The executive government of the Commonwealth was made the sole collector of such customs, and a date was anticipated two years ahead for the imposition of a uniform tariff for the continent. But one state, Western Australia, was permitted to impose duties for five years after joining

the Union; and in other cases also tariffs were to continue, the revenue being paid back in whole or in part to the state in which it had been raised. To counterweigh loss of revenue or economic disadvantage the Parliament was empowered to grant financial assistance to any state as it thought fit.

The preoccupation of the modern state with economic matters and the provision of social services has shown itself in certain differences between early and more recent federal unions. One of the greatest disadvantages of the American federation has arisen from the fact that it was established before these responsibilities were undertaken by the state, and consequently no provision was made for the federal authority to organize them. That was also, in very slightly less measure, true of Switzerland; but in this case, constitutional amendment being easier, a marked adaptation has taken place. At the revision of 1874 the power was given to the federal authorities to regulate the conditions of child labour. In 1908 it was decided that "the Federation shall have power to establish uniform regulations in the industrial field." On the other hand, law relating to labour remains in America the function of the states. Powers have been granted in Switzerland to enact laws to deal with health conditions and to combat infectious diseases. In 1912 sickness and accident insurance became a federal concern: the cantons administer sickness benefits; the Accident Insurance Institution has directors appointed by the Federal Government. The federal control of roads and water-power has been increased. By an amendment of 1908 hydro-electric power was placed under the supervision of the federation; the earlier condition had meant a lack of uniformity, that supply had often been available abroad in preference to in Switzerland itself, inadequate development, and a waste of investment. Similarly, in 1872 a federal railway department was created. Owing to inefficiencies of the private companies and lack of co-ordination, nationalization under the federal

authority was eventually approved by referendum creating a constitutional amendment in 1898. A federal bank was constituted in the same way in 1907.

In America there have been some signs of development in the same direction, but not in nearly so extensive a way. The Federal Reserve Board and the New Deal innovations provide the most important examples. But in the United States the difficulty of constitutional amendment has been further complicated by the existence of what amounts to a Bill of Rights framed a century and a half ago which, under the guise of defending individual liberty, has stood in the way of the development of social services and has prevented even the state legislatures from operating an effective regulation of such matters as workmen's compensation and labour conditions.

Because, under the British North America Act, powers not specified as belonging exclusively to the provinces may be exercised by the Canadian Parliament, these difficulties have not arisen there. Nor is there any such problem in South Africa owing to the supremacy of Parliament. But in Australia the allocation of powers followed more on American lines. It was very different, however, in the extent of the functions attributed to the common government. Coming more than a century later than the constitution of the United States, it naturally gave social and economic powers to the federal government that were not thought of in the eighteenth century. Among these were industrial arbitration, invalid and old-age pensions, the acquisition and construction of railways with the consent of the states through which they pass, and insurance. But apart from these the general resemblance to the American system is striking. It must not be forgotten, however, that the Commonwealth constitution provides for amendment by referendum, and some additional powers have been obtained by this means. It has not proved an easy method of securing additional authority in practice,

for the electorates of the several states have shown a remarkable tenacity in the defence of state rights. Amendments proposed in 1937, for instance, which would have conferred the power on the Commonwealth Parliament to deal with air navigation and inter-state marketing, were defeated by large majorities. Some dissatisfaction has been expressed with what is regarded as the inadequate adaptability of the Australian constitution, and the case for reform would appear to be unanswerable.

There remains one further important subject: migration. Here too the practice shows some variation. The American constitution specifically laid it down that for twenty years the states should remain the authorities for dealing with migration, as well as the importation of slaves. After 1808 Congress became the regulating power. As we have seen, one reason for the formation of the South African Union was the desire for a united policy with regard to the native population and Asiatic immigrants. Consequently the Union Parliament naturally came to possess the right to determine this policy. Similarly, a cause of the Australian union was the desire for a strong policy on the deportation of criminals from Europe and the migration of foreigners, especially Asiatics; therefore the Commonwealth Parliament was given control of immigration.

Freedom of movement within the territory of the federation has been the normal provision. It follows naturally from the creation of a common nationality. In the conditions of the modern state it is clearly more easy to establish where there is federal control of such matters as labour conditions, insurance, pensions. Such control can alone prevent the growth of favoured areas into which people would tend to move. Indeed, the whole question of migration is inseparable from that of the control of such social services and of economic conditions. While again, as in the case of trade regulation, there are obvious political and economic advan-

tages in federal control of both, it does not appear to belong to the category of minimum requirements for federation. Some measure of possible compromise is supplied by the International Labour Organization. The conventions of this body, passed by two-thirds vote, have helped appreciably in the levelling of post-war standards. This is true even though no powers of compulsion belong to it. Were such an economic and social parliament to enjoy any authority of federal enforcement, it could conceivably simplify both the migration and the tariff problems of federal union by diminishing gradually the differences in standards of living.

Enough has been seen of federalism in practice to suggest certain conclusions. We have not, of course, examined all the federations that are or were; nor can we claim to have looked at every detail that may be worthy of study. It is perhaps fair to assert that federal union is too widespread a political form to be examined exhaustively in a short account. There are several other federations that we have not dealt with. The Austro-Hungarian Empire, the Austrian Republic, Mexico, Brazil, Malaya, and the Soviet Union are some of these. They reveal some differences and they fortify some conclusions, but it is doubtful whether much would be gained by adding them to this intentionally brief analysis. It can be safely claimed that they do not reveal any evidence to invalidate the generalizations that we can make from the more limited field of survey.

"The pluralistic world," said William James, "is more like a federal republic than like an empire or a kingdom." And there is a sense in which federalism, with its combination of separate unities, may be said to correspond to the nature of modern man. He is a member not of one but of many social unities. He belongs to a local area; perhaps to a church or party, to a state, to a group of like-thinking democracies, to a race, and, finally, to humanity. Thus it is hardly surprising that when we come to enquire into federalism in practice we find it covers too large an area of human experience to be readily spanned in a short space. At most we can claim to suggest certain principles and conclusions from a limited comparison.

That there is a minimum of conditions for a satisfactorily

constituted federation becomes clear very soon. That beyond this minimum there is room for much elasticity is equally certain. We have seen something both of the minimal requirements in political machinery and of the divergencies which have not prevented success. But it must be stressed that beneath agreement and difference there is of necessity a willingness to submit to a real measure of federal arbitrament. Where fundamental disagreement on matters of common concern persists, that willingness cannot be present; and the only result of attempted combination must be conflict. Divergency of that kind accounted for the civil war in America, and a continuance of union could not occur until it had been removed.

If one general lesson springs immediately from this examination, it is that the path to union is beset with hard obstacles and serious dangers. The difficulty of creating a federation is only too obvious. The factors which seem to be a necessary pre-condition of federal combination are many, and they are by no means often to be found in existence together. Experience of the practical side of government must be joined to an imaginative willingness to sacrifice immediate interests and long established customs and habits for bigger, but more distant ends. Above all, there must be a readiness to adventure along new paths.

It is clear too that federalism is essentially a democratic phenomenon, or at least that it is incompatible with dictatorial forms of government. For it requires that the various authorities, and even the most powerful and important, shall be ready to submit to principles of law which they cannot themselves alone determine. There is thus a very real sense in which the rule of law rather than of persons is a necessary feature of federalism. Law, of course, must be interpreted and carried into effect by persons; but there is a basic distinction between law regarded as the will of the ruler and law regarded as acceptance by the many of natural or reasonable

relationships. Submission to reason rather than authority, to a general view arrived at by free discussion instead of a pronouncement which cannot be questioned because of its source of origin: therein is the spirit of democracy and of successful federalism alike. The guiding principle of both is that authority is limited by the purpose for which it exists, and in the last resort the people determine that purpose. Social ends are thus related directly to individual ends. The federal government and the provincial government derive their authority from the same source; each is an "association of man with man" and is limited by the articles of its association. There is thus a hierarchy and an interlocking of authorities to carry out different sums of individual purposes.

When once this is understood there is no difficulty in appreciating why a common political philosophy, and a similar system of government, among different states is a necessary condition of their effective federation. When men were organized more as religious than as political units it was probably true that a common religious basis was a requirement of federal union. Similarity of economic and social structure would seem also to be a prerequisite. For, as it is with an efficient parliamentary system, agreement on fundamentals, though it may be combined with differences as to details and methods, is an essential of real federal union.

This conclusion is borne out by the history of Switzerland and of the United States in particular. Religious differences between the Catholic and Protestant cantons led to the formation of opposed leagues within the Swiss Confederation, and to civil war that disrupted the union. Not until the oligarchic cantons had been overthrown in 1830 and 1847, and democracy, from being the philosophy and the political system of a few, had become general, could the federation be created on lines that were to give it continuity. A common religious faith in eighteenth-century America, as in the

seventeenth century there, was one of the foundations upon which union was built. So was a common political attitude. On the other hand, economic and social conflict accounted for the American civil war.

Federal union is established largely to prevent war. To be successful in achieving that aim it must, then, be based upon certain elements of similarity. Religion, it is true, has receded somewhat into the background; and therefore a tolerance of difference, as in Switzerland and Canada, has been sufficient to maintain federal unity. Linguistic differences have shown less disruptive force. Here, again, as in South Africa, Switzerland, and Canada, tolerance of difference and the establishment of more than one official language, have been successful in resolving the difficulty.

Nor are the causes of federal combination hard to assess. Fear cannot be over-emphasized as a motive force. It has been present in some measure in every case of federal union we have examined. Fear of the Indians, French, or Spanish, coupled with the weakness of the home government at war with itself, did much to explain the American combination of 1643. Fear of the English, as well, accounted largely for the union that followed the war of independence, as it explained the combination for conduct of that war. Fear of the surrounding empires has played its part in the growth of Swiss federalism both before and after 1848. Fear of the natives in South Africa, of European or Asiatic interference in Australia, have played a perhaps less dominant part in those countries because federal practice was more current then and better understood, but it was undoubtedly a factor of no small importance. In Canada the colonists were afraid of an American annexation that might cut them off from the Pacific. In the Argentine fear of Brazil played a certain part in federal development. Fear, of course, must be coupled with a desire for independence, but on that assumption it has obviously played a chief role in all the federal develop-

ments examined. There is no doubt of this when federation has been the result of the coming together of independent units. Even in Germany its more complete evolution was fostered by the Napoleonic empire through a process of reaction. In Spain it might seem at a first glance that the same truth did not apply; but it must be remembered that the federal principle was the direct result of an alliance between Spanish Liberals and Catalan home-rulers to destroy an autocratic regime.

But fear of foreign invasion is not the only kind of fear involved. Foreign economic competition has also encouraged combination, though it would seem that even in Canada this has played a secondary role. The same may be said of immigration in Australia.

Internal disorder and war have been another similar cause. There can be no doubt that the authors of the American constitution were largely moved by the desire to prevent the spread of revolutionary doctrine, mob-rule, and interference with property. They also foresaw and feared the possibility of the creation of warring sovereignties on the European model, competing for the unexploited lands of the west. In Canada federation seemed the only possible solution of the disorders that had been current so often before its inception. In South Africa fear of the natives was as much a part of this as of the external problem. One, at least, of the principles of Swiss federalism was established by the practice of intervention to maintain the *status quo* reasserted by the Vienna Congress.

The possibility of securing economic advantages through union has also been a significant motive force. But again, this cannot claim to have been so powerful or general a factor. In the American union trade development was a very present but a secondary consideration, although it is true that the need for a federal control of trade relations with foreign countries was the principal reason for the

summoning of the Philadelphia Convention. Canada affords the most striking example of the operation of this factor. The advantages to be obtained from the building of interstate communications, and especially a railway linking the Atlantic colonies with the chief inland towns; the vision of an eventual railway from Atlantic to Pacific; the possibility of a federal undertaking or supervision of works of common advantage; the greater credit for borrowing purposes of a strong central government: all played their part in the fostering of union. Indeed, the building of an inter-colonial railway was the specific price demanded and paid in the case of one colony as a condition of its joining. Such economic considerations also played their part in the creation of the South African Union. Here, again, railway development was a factor of the first importance. So were trade barriers. Both were regarded as among the strongest arguments for combination. In Australia, however, economic factors appear to have been as much an obstacle to the creation of the Commonwealth as a contributory cause. The Swiss Confederation of 1848 seems to have owed little to the hope of economic advantage, the federal government being expected to be a financial burden upon more wealthy cantons. But it has been used to secure all manner of economic advantages since its inception; and the general revision, which all but created a new constitution in 1874, was in considerable measure caused by the anticipation of economic benefit.

Apart from the causes of federal union, the conditions for its effective continuance have already been suggested in the sections dealing with federal machinery, legislative, executive, and judicial, as well as in the discussion of the allocation of functions.

There only remains to be examined the method by which a federal constitution is habitually drafted. We can detect three stages in this, not all of them being utilized in every case. There is first the preliminary meeting of representatives

of the several governments. Having shown some measure of agreement, if not on the exact nature of the proposed union, at least on the guiding principles to be followed, they then decide to call a convention which can claim a greater representativeness than a mere conference of ambassadors from independent states. The work of this body may then be submitted for even more direct popular approval by the state legislatures or by popular referendum, or both. In America we have the Confederate leaders, the Convention, and ratification by the state legislatures. In Switzerland, a drafting by the Confederation, imposition of the changes by military victory, and cantonal ratification. In the Argentine agreement in a convention, a similar but longer military interlude, followed by a further convention and state ratification. In Canada and South Africa the process resembled that in the United States, the Imperial Parliament intervening but taking a quite secondary position. In Australia a similar procedure was followed to that in Canada, though it took longer and confronted more difficulties; and here it was followed by submission to the state electorates. The long discussion in America and in Germany of the nature of federal constitutional forms has indicated the great importance which attaches to the submission of the constitution to as direct as possible a general popular approval. For otherwise it may be claimed to be merely a treaty between independent sovereign states terminable at will by the renewed exercise of their inalienable sovereign rights. Secessionist movements have always had to be based upon such a claim. It is significant, however, of their unreality that there is never included in a federal constitution any provision for such secession.

Having shown, or attempted to show, what experience suggests to be the necessary causes and conditions of federal union, we can safely leave the question of how far these prevail in modern Europe, and how far the League of Nations is likely to prove a mere step in the development

from alliance through confederation to effective federal statehood.

Suffice it to notice in the League the same lack of any direct control of force or taxation that we have seen to distinguish early forms of confederation, the same paralysing emphasis on unanimity and state equality, the same absence of an efficient executive. It is true that the League Council does constitute a recognition of inequality by the creation of permanent representation for the Great Powers alongside election of the others by the Assembly. It is also not unimportant that committees have been able to issue resolutions by majority vote. But the whole system is vitiated by both the lack of a League force and the limiting of League functions to mere recommendation. On secondary matters, however, not involving state power and prestige, such as collaboration in administration—health, communications, labour, colonies, social questions like the drug traffic—it has shown itself rather more effective, and has done something to lay the foundations of a series of international government departments with an efficient international civil service. But internationalization here has proceeded to a less marked degree than in the organs of collaboration set up by the Allies in the wars with Germany, or in the League control of international waterways and of such confiscated territories as the Saar and Dantzig. Furthermore, in economic affairs there have developed, either in association with the League or between government departments, inter-state organs for planning and regulating production—for instance, in rubber, tin, and wheat—that suggest the desirability of extending such principles. Extended application of this type of control to other key commodities like coal, cotton, and wool, or such services as civil aviation, arms production, railways, and shipping, but under proper responsible co-ordination and in accordance with recognized principles of public policy, might well solve some of the problems of federal union.

With the significance of these two developments, namely international technical administration and international economic control, I have attempted to deal elsewhere.[1]

But we can conclude with an illuminating quotation from Professor Laski's *Problem of Sovereignty*: "The one thing that must strike the modern observer of any federal constitution is the growing impatience with its rigid encasement, the ever-insistent demand that the form shall be made equally elastic with the spirit. And in the variety of its group life, the wide distribution of its sovereign powers, he may not unjustly see the surest guarantee of its perennial youth."

[1] In (for the first) my *League Committees and World Order*, and (for the second) my *Raw Materials and International Control*.

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INDEX

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